

University of Cape Town
School for Advanced Legal Studies

Supervisor: **Prof. Dick Christie**

MINOR DISSERTATION

‘The Vienna Convention:
A uniform approach to fill gaps within the scope of the Convention’

DUE 15th OF FEBRUARY 2007

Joachim Froehlich
FRHJOA001
(LL.M. by Coursework)

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LL.M. by Coursework in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LL.M. by Coursework – dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations

Munich, 10 February 2007

Table of Content

	Page
I. INTRODUCTION	4
II. LEGAL HISTORY OF ART 7 (2) CISG	6
1. Draft of Uniform Sales Law of 1935	7
2. Uniform Law on the International Sale of Goods (ULIS)	7
3. UN Convention on Contracts for the International Sale of Goods (CISG)	9
III. ROLE OF ART 7 (1) AND (2) CISG: ‘ANTI-AGING-TOOLS’ ...	11
1. Importance of an internal solution	12
2. Distinction between art 7 (1) and 7 (2) CISG	13
3. Relationship between art 7 (1) and 7 (2) CISG	14
IV. PRINCIPLES OF INTERPRETATION – ART 7 (1) CISG	14
1. ‘International character’ – prohibition of domestic concepts	15
2. ‘Promote uniformity in its [CISG] application’	17
3. ‘Observance of good faith in international trade’	18
V. THE GAP-FILLING METHODOLOGY – ART 7 (2) CISG	20
1. Locating gaps ‘praeter legem’	20
2. Admissibility of ‘analogy’ as a gap-filling instrument	21
3. Relationship between ‘analogy’ and the ‘general principles’	24
a) Comparative examination of analogy as a gap-filling method	24
b) Priority of analogy?	26
4. Gap-filling by means of general principles	27
a) Different gap-filling approaches	27
aa) ‘True Code approach’	27
bb) ‘Meta-Code approach’	27
cc) Approach endorsed in the CISG	28
b) Nature and determination of general principles	29

aa)	General discussion	29
bb)	Connection between the general principles and the CISG	30
cc)	‘Unidroit Principles’ and ‘Lando Principles’	32
dd)	Ways of extracting general principles from the CISG	34
c)	Reference to domestic law as the last exit	35
VI.	LIST OF GENERAL PRINCIPLES	36
1.	General Principles expressly stated in the CISG	37
a)	Principle of party autonomy, art 6 CISG	37
b)	Principle of prevalence of usage, art 9 CISG	38
c)	Principle of informality of declarations, art 11 CISG	40
2.	The need for the observance of good faith, art 7 (1) CISG	41
a)	‘Good faith’ as a general principle of the CISG	41
b)	Aspects of the general principle of good faith	43
aa)	Principle of reasonableness	44
bb)	‘Venire contra factum proprium’ – ‘estoppel’	46
cc)	Prohibition of the misuse of rights	48
c)	Issues outside the principle of good faith	49
aa)	Acting as a prudent businessman	49
bb)	Additional obligations of a positive character	50
3.	Principles to be deduced from other provisions of the CISG	50
a)	Pacta sunt servanda	51
b)	Favor contractus principle	51
c)	Principle of loyalty	53
d)	Principle of co-operation	53
e)	Principle of fair trading	55
f)	Imputation of third party’s conduct and knowledge	56
g)	Principle of full compensation	57
aa)	General overview	57
bb)	Payment of interest	58
h)	Principle of mitigation	63

i)	Principle of concurrent performance	64
j)	Right of retention	65
k)	Principle to determine place of payment of all monetary obligations	66
l)	Dispatch principle	68
m)	Theory of receipt	69
n)	Passing of risk	71
o)	Encumbrances and benefits	72
p)	Computation of periods of time	72
q)	Principle of forfeiture	73
r)	Principle concerning issue of burden of proof	74
4.	Rules not to be interpreted as general principles	76
a)	Currency of payment	77
b)	Issue of set-off	79
c)	Seniority of payment claims	80
5.	Principles to be found outside the CISG	81
a)	General comments	81
b)	Examples of the Unidroit Principles	81
aa)	Good faith principle	82
bb)	Principle of reasonableness	82
cc)	Principle of full compensation	82
dd)	Place of payment	83
ee)	Favor contractus principle	83
VII.	CONCLUSION	84
	Bibliography	85

The Vienna Convention:

A uniform approach to fill gaps within the scope of the Convention

I. INTRODUCTION

The importance of the 1980 United Nations Convention on Contracts for the International Sale of Goods¹ (hereinafter ‘Convention’ or ‘CISG’) is widely recognised all over the world.² This becomes obvious due to the fact that 70 countries³ are parties to the Convention⁴ leading to a possible application of its provisions to contracts of sale of goods throughout these parts of the world.⁵ Additionally, parties, having their place of business in a country not signatory to the Convention, can freely choose the CISG to be applicable to their international sales contracts.

The Convention’s important role in international trade is closely connected with the idea the drafters of the CISG had in mind while working on it, which was to produce a uniform body of law applicable to contracts for the international sale of goods.⁶ The objective was to remove existing legal barriers in this field of law and to promote its

¹ Also known as the Vienna Convention; Final Act of the United Nations Conference on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18 (1980).

² See Visser ‘Gaps in the CISG’, chapter I. 1.

³ As at 01 February 2007

⁴ A list of the countries, which are party to the CISG can be seen on the web: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

⁵ According to art 1 (1) CISG, the Convention applies between parties whose place of business are in contracting states or when the applicable private international law leads to the application of the law of a contracting state.

⁶ See Felemegas ‘Article 7 and Uniform Interpretation’, p. 269

development.⁷ In fact, the Convention was the result of efforts of more than five decades pushing towards unified sales law.⁸

This long and slow process can easily be explained by thinking about the inherent conflict of clashing (legal⁹) cultures with different needs and demands. Consequently, the unification of the law of sales contract with the goal of being applied as widely as possible could only be achieved by finding compromises which still had to be suitable and effective. This hurdle was well taken by the delegates from all over the world charged with the drafting of the CISG.

Nevertheless, this doesn't mean that there were no aspects of law on which the drafting body – the United Nations Commission on International Trade Law (UNCITRAL) - couldn't reach any agreement. Due to the compromise-driven drafting process and the complexity of the law itself, inevitable gaps – outside as well as within the scope of the CISG¹⁰ – are visible. Furthermore, symptoms of aging can be determined within the Convention partly due to the misjudgment of the practicality of certain provisions and partly due to developments which were not foreseeable at this point in time, mainly of a technical and economic nature.¹¹ A good example therefore is the whole issue of electronic commerce absolutely not developed in 1980 but of great importance in international trade in our days.

The danger specifically arising out of gaps within the scope of the Convention – so called gaps *praeter legem*¹² - is significant. In case of such gaps - but also when ambiguities or uncertainties arise - the temptation to directly resort to domestic law, to be determined by the rules of private international law of the forum, is high. Recourse to domestic law however is not compatible with the goal to achieve uniformity due to the fact that differences in the national law result in undesired differing decisions and finally

⁷ See Povrzenic 'Interpretation and gap-filling', Introduction

⁸ Starting point were the 1930s with the first drafts drawn up by Ernst Rabel for UNIDROIT; see also Chapter II., p. 6 of this dissertation; Koneru 'The International Interpretation', Introduction; Bonell 'The Unidroit Principles and CISG', part 1.

⁹ Common law and civil law countries had to be satisfied.

¹⁰ A distinction between these two kinds of gaps will be made in Chapter V. 1., p. 20 of this dissertation.

¹¹ See Schlechtriem 'Interpretation, gap-filling', preliminary remarks

¹² For the purpose of this dissertation, any reference to 'gaps' has to be seen as a reference to gaps *praeter legem*.

in uncertainty.¹³ Furthermore, this is also contrary to the intention of parties choosing the CISG to govern their specific relationship in order to exclude the applicability of a certain domestic law.¹⁴

In order to uphold the main purpose of the CISG – to create uniformity in the field of international law for the sales of goods - resorting to domestic law has to be seen as the last exit to fill existing gaps within the Convention.¹⁵ In other words, one should try and work towards a uniform approach for filling those gaps, which minimises the use of domestic law. Starting point therefore is art 7 (2) of the CISG, which is concerned with the issue of gap-filling.

After giving an introductory overview of the legal history of art 7 (2) CISG in Chapter II., I will then examine the role of art 7 (1) and (2) CISG (Chapter III.), before briefly discussing the principles of interpretation, enshrined in art 7 (2) CISG, in Chapter IV.. Main focus of the paper will then be to explain the gap-filling methodology of the Convention in Chapter V. and to give a survey of the general principles to be applied in order to fill gaps in accordance with art 7 (2) CISG in Chapter VI..

II. LEGAL HISTORY OF ART 7 (2) CISG

In order to fully comprehend the functioning of art 7 (2) CISG, it is important to have a closer look at the legal history of this specific provision. Starting with the predecessors of art 7 (2) CISG, this dissertation will finally investigate how its final version came into force, mainly by discussing the different proposals of which gap-filling approach should prevail in the Convention.

¹³ See Felemegas ‘Article 7 and Uniform Interpretation’, p. 269

¹⁴ See Felemegas ‘Article 7 and Uniform Interpretation’, p. 272

¹⁵ See Felemegas ‘Article 7 and Uniform Interpretation’, p. 270

1. Draft of Uniform Sales Law of 1935¹⁶

The first important reference to gap-filling within the law of international sales of goods can be found in the draft of the Uniform Sales Law of 1935, which was launched by the International Institute for the Unification of Private Law (UNIDROIT). Art 11 of the draft ruled that gaps not expressly settled in the statute had to be filled with general principles on which this statute is based unless it provides for the application of a national law.¹⁷

Already at this early point in time, the drafters had recognised that having recourse to domestic law in order to fill gaps represents a main danger for creating a truly uniform legal system of law.¹⁸ Consequently, art 11 restricted the application of national law only to cases, where the draft ‘formally’ contained a provision to this effect.

2. Uniform Law on the International Sale of Goods (ULIS)

The work of UNIDROIT culminated in the Uniform Law on the International Sale of Goods of 1964¹⁹ (hereinafter ‘ULIS’) - also known as the Hague Sales Law - which went a step further in preventing the use of domestic law.

Two provisions of ULIS are to be mentioned, dealing with the interpretation of this statute and – in particular – with the method of filling gaps within its scope of application:

(1) The first provision – art 2 ULIS – states:

‘Rules of private international law shall be excluded for the purpose of the application of the present Law, subject to any provision to the contrary in the said Law’.

¹⁶ The draft is published in Ernst Rabel, *RabelsZ*, p. 8

¹⁷ Wording of art 11 of the draft of the Uniform Sales Law of 1935: ‘If this Statute does not expressly settle a question and does not formally provide for application of a national law, the court decides in conformity with the general principles on which this Statute is based’

¹⁸ See therefor Ernst Rabel, *RabelsZ*

¹⁹ The Convention is available online at <http://www.unidroit.org/english/conventions/c-ulis.htm>

- (2) The second provision – art 17 ULIS – dealing with the problem of gap-filling, reads as follows:

‘Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which the present Law is based’.

If both provisions are read together, it becomes obvious that the intention of ULIS was clearly ‘to constitute a self-contained law of sales, to be construed and applied autonomously, i.e., without any reference to or interference from the different national laws.’²⁰ This ‘revolutionary’ approach of creating a self-sufficient and independent set of rules strengthened the way towards a codification of the international law for the sale of goods to be applied in a uniform manner.

Although the wording of art. 2 ULIS seems to be clear, there were diverging opinions on the interpretation of these provisions in respect to the question, to what extent private international law had to be excluded when dealing with the process of filling gaps.

Mostly, art 2 ULIS was interpreted to mean that gap-filling should exclusively be done in conformity with general principles.²¹ In the absence of general principles to be derived from the provisions of ULIS itself, they would have to be found through a comparative legal analysis.²²

However, others still favoured the use of domestic law, to be determined by the rules of private international law, in order to fill gaps in the event that no general principles could be extracted out of the provisions of ULIS itself.²³

The courts only developed a few general principles from the provisions of the ULIS itself.²⁴ Interestingly, a significant number of court decisions on the ULIS decided

²⁰ See Bianca/Bonell *Commentary*, p. 66

²¹ See therefor Magnus ‘General Principles’, part 3. with references to other authors, supporting this view.

²² See *supra* note 21

²³ See *supra* note 21

²⁴ For example the principle of good faith: OLG Düsseldorf January 20, 1983, in Schlechtriem *Internationale Rechtsprechung*, art 17, para 7; the principle of reasonableness: Hof Amsterdam January 5, 1978, S & S 1978, 79; the prohibition against abuse: OLG Karlsruhe July 25, 1986 in RIW 1986, 818; further the principle that the place of performance for payment as well as repayment of the purchase price

that, if no general principle could be ascertained in ULIS itself, the issue in matter had to be regarded as not subject to ULIS, which consequently had to be decided in accordance with the applicable domestic law, determined by rules of private international law.²⁵ From my point of view, these decisions can be criticised due to the improper application of art 17 ULIS: According to this provision, one has first to decide whether or not the matter is governed – but not expressly settled – by ULIS, before having recourse to general principles. This order was overturned in the mentioned court decisions.

Although this gap-filling approach was rather progressive, the success of ULIS was small. One reason therefore, was the use of untranslatable civil law concepts.²⁶ Only nine states ratified it, including seven from Western Europe.²⁷

3. UN Convention on Contracts for the International Sale of Goods (CISG)

In 1968, the newly born United Nations Commission on International Trade Law (UNCITRAL) decided to start a new attempt in developing a uniform law in the field of international sale of goods²⁸, ending in 1980 in the well known CISG.

Concerning the CISG, the issue of gap-filling was very controversially discussed, although one could think that due to its goal of uniformity, the fundamental idea of restricting the need of domestic law should have been undisputed.

is the seller's place of business: BGH October 22, 1980, BGHZ 78, 257; the principle that, in case of doubt, payments have to be applied first to interest on default, then to the oldest outstanding debt: Rb. Alkmaar May 27, 1982, in Schlechtriem *Internationale Rechtsprechung*, art 17, para 4; Hof Amsterdam November 4, 1982, Ned. IPR 1983 No. 215; the principle that the law of the seller is applicable to issues of prescription: OLG Schleswig-Holstein April 8, 1992, RIW 1992, 582; the principle that in case of doubt the payment has to be made in the currency at the creditor's place of business: OLG Koblenz January 21, 1983, in Schlechtriem *Internationale Rechtsprechung*, art 17, para 8; and finally the principle that the theory of complete restitution applies to compensation for damages: BGH November 28, 1990, NJW 1991, 639 (640)

²⁵ See eg for the transfer of rights (OLG Hamm July 1, 1982, in Schlechtriem *Internationale Rechtsprechung*, art 17 para 5), the Ordinance (OLG Koblenz March 1, 1985, Art. 17 No. 11), the liability for third parties (BFH March 14, 1984, NJW 1984, 2034; OLG Hamm December 19, 1983, in Schlechtriem *Internationale Rechtsprechung*, art 40 para 7) and the setoff (AG Frankfurt January 31, 1991, IPRax 1991, 345)

²⁶ See Honnold 'The Sales Convention', p. 207

²⁷ Belgium, Federal Republic of Germany, Italy, Luxembourg, Netherlands, S. Marino, United Kingdom, Gambia and Israel

²⁸ See Bonell 'The Unidroit Principles and CISG', part 1.

As a consequence, this matter was completely ruled out in the early stages of the drafting discussions²⁹ and was still disputed at the Diplomatic Conference of 1980.³⁰

The proposals for the gap-filling mechanism in the CISG can be divided into two groups:

- (1) The first group of representatives who favoured an approach contrary to the one set out in art 17 ULIS (see above), argued in favour for the recourse to specific legal set of rules, already in existence in order to fill gaps within the CISG. Their main argument for this way of gap-filling was that reference to ‘general principles’ would be too uncertain to provide guidance.³¹ They argued for instance that the existence of general principles was very doubtful due to the fact that the Convention didn’t mention them. Examples for this point of view can be found in Bulgaria’s proposal, recommending the use of ‘the law of the seller’s place of business’³² and the Czechoslovakian proposal preferring ‘the law applicable by nature of the rules of private international rules’³³ to be the source of law.
- (2) The second group of representatives who favoured the wording of art 17 ULIS, pleaded for the recourse to ‘general principles’ of the CISG as the primary step of filling gaps within the scope of the Convention. Emphasising the need to have in mind the international character of the CISG and its goal to create uniformity, they stressed that recourse to domestic law would increase uncertainty even more and would therefore contradict the process of unifying the law.³⁴ According to Italy’s proposal, reference should be made first to the general principles on which the Convention is based and only in the absence of such principles should national law of each of the parties be taken into account.³⁵

²⁹ See implementation of the Commission’s decisions relating to General Conditions of Sale and Standard Contracts in U.N. Doc. A/CN.9/54 (1971); see Povrzenic ‘Interpretation and gap-filling’, part 2.

³⁰ See Magnus ‘General Principles’, part 3.

³¹ See Rosenberg ‘The Vienna Convention’, p. 448

³² See the proposal of Bulgaria in: A/Conf.97/C.1/L.16, p. 87

³³ See the proposal of Czechoslovakia in: A/Conf.98/C.1/L.15, p. 87

³⁴ See Rosenberg ‘The Vienna Convention’, p. 448

³⁵ See the proposal of Italy in: A/Conf.97/C.1/L.59

However – due to different reasons – none of those proposed approaches gained sufficient support among the delegates.

The representatives finally agreed – with a small majority of 17:14 with 11 abstentions³⁶ – on the following compromise solution between these two groups of thoughts: The first part of the Italian proposal, referring to ‘general principles’ was kept. Meanwhile, the second part of that proposal - bearing possible difficulties in its application - was replaced with the Czechoslovakian proposal. Thus, the final wording of art 7 (2) CISG reads as follows:

‘Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.’

Today, this combined gap-filling approach of having recourse to domestic law only as the last exit in case of an absence of applicable ‘general principles’ can be found not only in the CISG. The same approach was adopted in more recent conventions on the field of Private Law.³⁷

III. ROLE OF ART 7 (1) AND (2) CISG: ‘ANTI-AGING-TOOLS’

As mentioned before, the CISG was finally accomplished more than 26 years ago in 1980. Due to the pace of new developments on the field of international trade, the provisions of the Convention are confronted with situations which haven’t been foreseen while drafting the Convention. As a consequence, inevitable aging symptoms are getting more and more obvious. Despite its age, the Convention can still be regarded as the most important statute on the field of international trade.

³⁶ See Schlechtriem *Commentary* (1998), art 7, para 4, footnote 7; Zeller ‘Four-Corners’, chapter V. 4.

³⁷ See Art. 6(2) Convention on Agency in the International Sale of Goods, Geneva, 17 February 1983, available online at <http://www.unidroit.org/english/conventions/1983agency/1983agency-e.htm>; Art 6(2) Convention on International Financial Leasing, Ottawa, 22 May 1988, available online at <http://www.unidroit.org/english/conventions/1988leasing/1988leasing-e.htm>; Art. 4(2) Convention on International Factoring, Ottawa, 28 May 1988, available online at <http://www.unidroit.org/english/conventions/1988factoring/1988factoring-e.htm>

In the following passage, I will first discuss how the draftsmen of the CISG prevented the latter from getting out-fashioned. The hereby extracted different approaches will then be briefly compared in order to understand their relationship.

1. Importance of an internal solution

The difficulties faced while drafting the CISG have already been discussed at an earlier stage. However, it is even harder to think about implementing corrections or amendments of the current version of the Convention, necessary to bring its provisions up to date with the standards necessary to cope with modern trade. This would make it inevitable to reassemble representatives of all contracting states in order to work towards this goal.³⁸ It is not unlikely that this would again take years of debates, finally often ending in compromise solutions only. Besides that this process will have to be repeated regularly because of never ending developments, it would be naive to think that all grievances could thereby be solved.

To avoid this never ending story, the draftsmen apparently had in mind while working on the actual wording, convention-internal solutions have been installed within the CISG, allowing for a flexible application of its provisions for the purpose of keeping pace with the developments.

It is in particular art 7 CISG with its two paragraphs, which provides two legal technical tools due to which the Convention will still have a great importance in the future.

Art 7 (1) CISG³⁹ deals with the interpretation of the Convention⁴⁰, while art 7 (2) CISG concerns the issue of gap-filling.

While making use of these legal techniques, one should always keep in mind the main goal of the CISG – the creation of a uniform law. Therefore, it is extremely

³⁸ See Schlechtriem 'Interpretation, gap-filling', Preliminary remarks, p. 1

³⁹ Wording of art. 7 (1) CISG: 'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.'

⁴⁰ To be distinguished from the scope of art 8 CISG covering the interpretation of specific statements or conduct of the individual parties to the transaction.

important to apply these tools uniformly. Otherwise, the so-achieved flexibility will be counterproductive.

2. Distinction between art 7 (1) and 7 (2) CISG

Although the main focus of this dissertation remains on gap-filling in accordance with art 7 (2) CISG, it wouldn't be wise to blend out completely the interpretation of the Convention, stipulated in art 7 (1) CISG. Already the placement of these provisions shows their close relationship towards each other.⁴¹ Moreover, interpretative problems also become apparent in relation to art 7 (2) CISG, so that a knowledge of the basic principles of interpretation is vital for correctly comprehending art 7 (2) CISG.

To find a clear distinction between the scope of art 7 (1) and (2) CISG is a difficult task.⁴² Some commentators share the opinion that the need to find a clear borderline between these techniques shouldn't be overrated because in practice, it is of little interest whether one resorts to interpretative measures or to the method of gap-filling in order to find solutions to a particular case caused by further developments.⁴³

Truly, establishing a distinction, suitable for every particular case, is not recommendable due to the fact that the borderline depends on the specific circumstances of each particular case and can therefore mostly be blurred.⁴⁴ However, this doesn't mean that it is not essential to clearly distinguish both instruments in each single case because of their completely different inherent approach.⁴⁵

In case of further developments like for example contracting by means of electronic communications, one could on the one hand think about broadening existent provisions of the CISG, dealing with the issue of declarations and their communication⁴⁶ in accordance with art 7 (1) CISG. On the other hand it would be

⁴¹ See Felemegas 'Article 7 and Uniform Interpretation', 269

⁴² See for example Schlechtriem *Commentary* (2005), art 7, para 28

⁴³ See Schlechtriem 'Interpretation, gap-filling', Preliminary remarks

⁴⁴ See supra note 43

⁴⁵ Same opinion shared in eg Schlechtriem 'Interpretation, gap-filling', Preliminary remarks

⁴⁶ In particular offer, acceptance, revocation, avoidance, reduction, notice of defects and others

possible to assume a gap within the scope of the Convention, leading to the application of art 7 (2) CISG.

3. Relationship between art 7 (1) and 7 (2) CISG

After having briefly discussed the distinction of the two paragraphs of art 7 CISG, the next step is to understand their relationship, important to correctly apply them in accordance with the intention of the draftsmen of the CISG.

Therefore, already the systematic position of the two instruments within art 7 CISG gives helpful guidance. Due to the fact that the instrument of interpretation was placed in paragraph (1) of art 7 CISG in front of the method of gap-filling, laid down in art 7 (2) CISG, there is a very strong indication for the former having an overriding position to the latter. This is supported by the fact that a wider interpretation of a specific provision constitutes a much smaller intervention in the Convention compared to the process of gap-filling. Furthermore, a gap within the scope of the Convention – pre-condition for the application of art 7 (2) CISG –⁴⁷ demands the existence of an issue not expressly settled in the Convention. This can't be assumed if the scope of a certain provision can be broadened via interpretation.

Recapitulating, I believe that there can be only one correct understanding of the relationship of art 7 (1) and (2) CISG, namely that interpretation in accordance with art 7 (1) CISG must first be tried before having recourse to the possibility of gap-filling, enshrined in art 7 (2) CISG. This view is shared by most commentators.⁴⁸

IV. PRINCIPLES OF INTERPRETATION – ART 7 (1) CISG

As seen just above, the instrument of interpretation has a vital role in relation to the method of gap-filling. In any case, one has first to check the possibility of a wider interpretation of provisions of the CISG before having recourse to the method of gap-

⁴⁷ See thereto Chapter V. 2. on p. 21 of this dissertation

⁴⁸ See eg Schlechtriem 'Interpretation, gap-filling', part II. 1.; Gebauer 'Uniform Law', p. 697; Schlechtriem *Commentary* (2005), art 7, para 28; Zeller 'Four-Corners', chapter V. 5.

filling. Moreover, the principles of interpretation, enshrined in art 7 (1) CISG, are to be observed also for the purpose of interpreting art 7 (2) CISG.

Consequently, a brief overview over the interpretation principles, expressly set out in art 7 (1) CISG, shall now be given⁴⁹ before moving towards the gap-filling methodology in Chapter V.

Art 7 (1) CISG⁵⁰ enunciates three principles of interpretation, which have to be observed:

- (1) ‘international character’ or origin of the rules;
- (2) ‘need to promote uniformity’;
- (3) ‘observance of good faith’.

1. ‘International character’ – prohibition of domestic concepts

Firstly, art 7 (2) CISG demands that, when interpreting the Convention ‘regard is to be had to its international character’. In other words, the interpretation of the CISG has to be done in the light of the origin of the rules.⁵¹

The reason for reminding any applicant of the Convention of its international character can easily be explained with the goal to create a uniform law in order to replace any provisions of a particular legal system previously governing issues within its scope.⁵² The mere adoption of the CISG by each single state without requiring them to uniformly interpret it wouldn’t be very successful due to differences in the legal as well as social understanding. This already becomes obvious when you look at the different approaches prevailing in civil law and common law countries. Civil law judges for example give more weight to preparatory materials and the legal history of a statute, while their colleagues in

⁴⁹ For more detailed comments thereto, please have recourse to the literature mentioned in the following footnotes

⁵⁰ See supra note 39 for the wording of art 7 (1) CISG

⁵¹ See Schlechtriem *Commentary* (1998), art 7, para 6; more detailed Schlechtriem ‘Interpretation, gap-filling’, part I. 2. a)

⁵² See Povrzenic ‘Interpretation and gap-filling’, part 3(A)

common law countries often stick to a plain meaning and grammatical structure of a statute.⁵³

But what exactly is meant when art 7 (1) CISG demands that a proper interpretation of the Convention has to take into account its international character? It has to be understood as an obligation, leading towards an autonomous interpretation of the provisions of the CISG.⁵⁴ This requires anybody concerned with the interpretation of the wording of the Convention, to refrain from rules or techniques in existence for the interpretation of domestic law.⁵⁵ This view is not only shared amongst most of the commentators, but also by courts.⁵⁶ Consequently, the interpretation of the Convention's terms and concepts is to be done in the context of the Convention itself.⁵⁷ However, the extension of the ban of recourse to domestic law is disputed. Some commentators share the view that a study of comparative law shall be admissible as the last exit⁵⁸, while others argue in the opposite direction, mentioning the risk of obtaining diverging jurisprudence to be increased hereby.⁵⁹ The latter group of commentators nevertheless accepts the recourse to domestic law concepts, 'when either the legislative history or the Convention itself lead to the conclusion that the drafters referred to concepts peculiar to a specific domestic legal system'⁶⁰

For the purpose of clarification, it has to be pointed out, that 'autonomous interpretation' is not a method of interpretation additionally to the established set of methods – literal, systematic, teleological and historical interpretation – but rather a principle of interpretation that gives preference to a particular kind of teleological and systematic argument in interpreting a legal text.⁶¹

⁵³ See supra note 52

⁵⁴ See eg Schlechtriem 'Interpretation, gap-filling', part I. 2. a); Brandner 'Admissibility of Analogy', part II. A. 1.; Povrzenic 'Interpretation and gap-filling', part 3(A); Gebauer 'Uniform Law', p. 685

⁵⁵ see supra note 54

⁵⁶ See for example Germany: BGH [Supreme Court], No. VIII ZR 51/95, April 3, 1996, Unilex database (1996)

⁵⁷ See Gebauer 'Uniform Law', p. 685-686

⁵⁸ See Brandner 'Admissibility of Analogy', part II. A. 1.

⁵⁹ See Ferrari 'Uniform Interpretation', part VIII.

⁶⁰ See supra note 59

⁶¹ See in more detail Gebauer 'Uniform Law', p. 686

To give an example, an autonomous interpretation of words requires to the awareness of the possibility that a particular word doesn't necessarily have to have the same meaning as in domestic law.⁶² Furthermore, if conflicting interpretations are looming because of the fact, that the Convention is drafted in several languages, the literal meaning of the term or concept in all authentic versions has to be taken into account in order to eliminate this risk.⁶³

At first sight, the concept of an autonomous interpretation can easily be seen as unproblematic. However, a closer look at it betrays the difficult challenge to every practitioner, namely to completely put aside certain preconceptions of their own domestic law.

2. 'Promote uniformity in its [CISG] application'

Back to the wording of art 7 (1) CISG, the reader is further being told that 'regard is to be had [...] to the need to promote uniformity in its [*the Convention*] application'. Among the commentators of the CISG, you can sometimes find the allegation that the promotion of uniformity is a logical consequence of interpreting the Convention with regard to its international character, as described above.⁶⁴ Consequently, they don't attribute an independent function to the need to promote uniformity.

In my opinion, this allegation is not completely true. Of course, an autonomous interpretation is a big step in the direction to a uniform application of the CISG. However, it can't be seen as a guarantee to achieve uniformity. On the one hand, it is not unlikely that two different courts render two diverging 'autonomous' interpretations of a specific rule.⁶⁵ On the other hand, some believe that these two principles do not always favour the same results, leading to the question, which of these principles prevails over the other in case of conflicts.⁶⁶

⁶² See supra note 58

⁶³ See Gebauer 'Uniform Law', p. 686

⁶⁴ See for example Povrzenic 'Interpretation and gap-filling', part 3(A)

⁶⁵ See Gebauer 'Uniform Law', p. 685

⁶⁶ See supra note 65

Clearly, the aim to promote uniformity sets out the task to develop a uniform method of interpretation.⁶⁷ Additionally, this principle implies that every jurisprudence has at least the obligation to observe foreign decisions.⁶⁸ Today, this is not an almost impossible task due to several web-sites, providing a wide range of international case law.⁶⁹ Anyhow, it has to be pointed out that foreign decisions do not have a binding effect on tribunals of another country.⁷⁰ They merely have a persuasive value.⁷¹

3. ‘Observance of good faith in international trade’

Besides the necessity to have regard to the international character of the Convention and the need to promote uniformity in its application, art 7 (1) CISG finally sets out the necessity to observe good faith in international trade.

This reference to the standard of good faith is the reason for mainly two controversially argued problems:

First, it is disputed, how this reference to good faith in connection with the interpretation has to be understood. Is it supposed to be only an additional criterion for the interpretation of the Convention itself or is it addressed to the parties to each particular contract of sale as well.⁷² As the observance of good faith is surely to be observed in relation to the interpretation of the provisions of the Convention, this dispute will further be examined under Chapter V.

A second question occurs regarding the exact understanding of the term ‘good faith’ in international trade.⁷³ Even if the notion of good faith in art 7 (1) CISG is to be understood as a mere instrument of interpretation, good faith may lead to a conflict

⁶⁷ See Brandner ‘Admissibility of Analogy’, part II. A. 1.

⁶⁸ See Brandner ‘Admissibility of Analogy’, part II. A. 1.; Honnold ‘The Sales Convention’, p. 210

⁶⁹ See for example <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=14315>, <http://cisgw3.law.pace.edu/> and <http://www.cisg.law.pace.edu/cisg/links.html> for links to other web-sites related to the CISG

⁷⁰ See for a more detailed discussion of this problem Ferrari ‘Gap-filling’, p. 71-73

⁷¹ See Ferrari ‘Gap-filling’, p. 72-73 with reference to Italian court decisions, confirming this point of view

⁷² See therefor for example Povrzenic ‘Interpretation and gap-filling’, part 3(B); Ferrari ‘Gap-filling’, p. 74

⁷³ See Povrzenic ‘Interpretation and gap-filling’, part 3(A)

with the main goal of the CISG, i.e., the promotion of its uniform application.⁷⁴ The reason therefor is the fact that no common understanding of the notion of good faith is to be found on a comparative level.⁷⁵ The vagueness of the definition of good faith makes some authors fear that the jurisprudence won't be able to develop a common definition.⁷⁶ Although the principle of good faith is an important concept in every legal system, a comparative study shows completely different approaches of its scope:

In most common law countries like for example in the United States⁷⁷, the scope of application of the concept of good faith is limited to the performance of the contract only. However, this meaning can not only be found in to common law systems. The French Code Civil⁷⁸ for example also contains a similar restriction in art 1134 (3)⁷⁹ of the Code Civil. In contrast to that, civil law systems generally apply the principle of good faith not only to the performance, but also to the formation and the interpretation of the contract.⁸⁰

As said before, these diverging concepts of good faith are in conflict with the promotion of the uniform application of the CISG.

To avoid conflicting jurisprudence to the most possible extent, it is at least evident that the reference to 'good faith in international trade' in art. 7 (1) CISG means that recourse to own national standards should be allowed only to the extent that they are assured to be recognised at a comparative level.⁸¹

⁷⁴ See Ferrari 'Gap-filling', p. 74

⁷⁵ See supra note 74

⁷⁶ See supra note 74 with references to other authors sharing this view

⁷⁷ See the (U.S.A.) Uniform Commercial Code (U.C.C.) § 1-203 (1978) ('Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.') and the Restatement (Second) of Contracts § 205 ('Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.')

⁷⁸ France is part of the civil law family

⁷⁹ Wording of art 1134 (3) of the French Code Civil: 'Elles doivent être exécutées de bonne foi.'

⁸⁰ See for example § 157 of the German Bürgerliches Gesetzbuch: 'Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.'; Art 12 of the Croatian Code of obligations: 'In the formation of obligations and enforcement of rights and duties resulting there from, parties to the transactions are bound by the principle of good faith.'

⁸¹ See Povrzenic 'Interpretation and gap-filling', part 3(B); Schlechtriem *Commentary* (2005), art 7, para 18

V. THE GAP-FILLING METHODOLOGY – ART 7 (2) CISG

After having had a closer look on the relationship between art 7 (1) and 7 (2) CISG and on the basic principles of interpretation, the main focus shall now be laid upon art 7 (2) CISG and its gap-filling methodology.

As we've seen above, gap-filling has an important role of preventing the Convention to become outfashioned due to developments in international trade unforeseeable at the time it was drafted. However, a differing understanding of the instrument of gap-filling, leading to diverging jurisprudence and thereby to legal uncertainty, finally endangers the goal of promoting uniformity in the application of the CISG. Consequently, it is crucial for the success of the Convention to develop a uniform approach to gap-filling.

Hence, I will now thoroughly examine how art 7 (2) CISG and its gap-filling methodology is understood amongst commentators and the jurisprudence in order to hopefully determine a widespread common understanding of how art 7 (2) CISG should be applied.

1. Locating gaps 'praeter legem'

Before further discussing the different gap-filling methods, the first logical step is to determine such a gap.

Generally, a gap can be characterized as an unintentional incompleteness in the convention.⁸² Thus, in general, no gap can be assumed if the draftsmen of the CISG intentionally omitted regulating a specific question.

However, it has to be distinguished between so called gaps 'praeter legem' and gaps 'intra legem'.

Only an internal convention gap or - in other words - a gap within the scope of the Convention, often called gap 'praeter legem'⁸³, is to be filled in accordance with art

⁸² See Brandner 'Admissibility of Analogy', part I. A.

⁸³ In the following, a reference to 'gap(s)' shall be seen as a reference to gap(s) 'praeter legem', unless it is stated otherwise

7 (2) CISG.⁸⁴ This correctly reflects the directive of this paragraph requesting ‘matters governed by this [the CISG] Convention’.⁸⁵

In contrast to that, gaps ‘intra legem’ (i.e. matters excluded from the scope of the CISG) are not to be solved in accordance with art 7 (2) CISG. Instead, they are governed by the respective national laws, to be determined in each single case by the applicable private international law.⁸⁶

It is sometimes difficult – due to a rather uncertain borderline –⁸⁷ to determine whether or not a specific question is governed by the Convention or not. Some matters are expressly excluded from the scope of the Convention like for example the ones mentioned in art 2, 3, 4, 5, 28 and 54 CISG. Additionally, rights based on fraud or agency law are also not governed by the CISG.⁸⁸ However, there are many controversially discussed matters of law remaining.⁸⁹ In each single case in dispute, the Convention has to be thoroughly interpreted according to the principles of interpretation enshrined in art 7 (1) CISG. Looking at the legislative history of the CISG appears to be one helpful resource to solve these disputes.

2. Admissibility of ‘analogy’ as a gap-filling instrument

Once a gap ‘praeter legem’ is located, another question in dispute springs up, regarding the admissibility of analogy as a gap-filling instrument of the CISG. Decisive for this question is how art 7 (2) CISG is to be interpreted. According to this paragraph, gaps within the scope of the Convention are to be settled by having recourse to general principles and, if this is not possible, by application of domestic law, to be determined by private international law.

This wording seems to imply that other gap-filling methods besides the one mentioned in art 7 (2) CISG are not admissible. Precisely, the admissibility of the instrument of analogy is questionable.

⁸⁴ See for example Visser ‘Gaps in the CISG’, chapter II. 2.

⁸⁵ See the complete wording of art 7 (2) CISG on p. 11 of this dissertation

⁸⁶ See Visser ‘Gaps in the CISG’, chapter II. 2.

⁸⁷ See for example Magnus ‘General Principles’, part 4. a)

⁸⁸ See Rosenberg ‘The Vienna Convention’, p. 446

⁸⁹ See supra note 87 for some examples

The fact that art 7 (2) CISG does not expressly mention analogy as one of the possibilities of filling gaps in the Convention appears to be curious especially from a German perspective, where analogy is the most important method of gap-filling⁹⁰ but also from a perspective of other civil law systems like for example in Italy⁹¹ and Austria⁹².

To respond to this question, it is necessary to apply the principles of interpretation, enshrined in art 7 (1) CISG⁹³ in respect of art 7 (2) CISG. Whether or not the analogical application of a provision as a way of gap-filling besides recourse to the general principles is admissible depends on how this paragraph is to be interpreted: broadly or restrictively?⁹⁴

Analogy wouldn't be admissible, if a historical interpretation reveals that the drafters of the CISG intentionally omitted to mention analogy as a gap-filler.⁹⁵

On the one hand, they must have been aware of analogy as another way of gap-filling because of the long tradition especially in Europe⁹⁶ and South America distinguishing between having recourse to general principles and an analogical application.⁹⁷ This view can be strengthened by the fact that already the admissibility of analogy under art 17 ULIS was intensively discussed in the academic literature and finally affirmed.

⁹⁰ See Brandner 'Admissibility of Analogy', part I. B.

⁹¹ See for example art 12 (2) Disposizioni preliminari al Codice civile (Italy, 1942): 'Whenever a case cannot be decided on the basis of a precise provision of the written law, recourse shall be had to provisions governing similar or analogous cases or matters. If the case still remains doubtful, it shall be decided according to the general principles of the juridical order of the State.'

⁹² First in this way is art 7 of the Austrian Civil Code (1811): 'If a case cannot be solved either by the text or the natural sense of a written provision, recourse shall be had to similar cases expressly provided for in other provisions of the law and to principles of analogous provisions. If the case still remains in doubt, it shall be decided according to the principles of natural law, taking into careful consideration all the circumstances of the case.'

⁹³ See Chapter IV. on p. 14 of this dissertation

⁹⁴ See Felemegas 'Article 7 and Uniform Interpretation', p. 280, Ferrari 'Gap-filling', p. 81

⁹⁵ See Brandner 'Admissibility of Analogy', part II. B. 2.

⁹⁶ See for example supra note 91, 92

⁹⁷ See Brandner 'Admissibility of Analogy', part II. B. 3.

On the other hand, it has to be said that, since UNCITRAL took over the task of unifying the law on international sales contracts, the word ‘analogy’ wasn’t mentioned at all in any of the discussions, leading to the final version of the CISG.⁹⁸

Consequently, the legal history of art 7 (2) CISG is inconclusive in respect of the admissibility of analogy as a gap-filler.

Despite that the unanimous answer to this question amongst the commentators is that analogy must be admissible.⁹⁹

Some don’t even raise this problem because to them, the admissibility of analogy is self-evident,¹⁰⁰ while others support this view rather casually without giving detailed reasons for it.¹⁰¹

However, there are some authors who give a more detailed reasoning to this question.¹⁰² The main argument towards admissibility is an argumentum a fortiori: If recourse to general principles is admissible than this must – a fortiori – count for analogy as well, since general principles can be applied more widely and are less connected to the text of the CISG itself.¹⁰³

From my point of view, the admissibility of analogy can already be affirmed by properly interpreting art 7 (2) CISG in accordance with the principles of interpretation, especially the need to promote uniformity in its application, enshrined in art 7 (1) CISG. In order to restrict the application of domestic law as much as possible and thereby promoting a uniform application of the Convention, art 7 (2) CISG must be understood broadly, also allowing analogy besides the recourse to

⁹⁸ See supra note 97; However, the summaries of the discussions, available in the Yearbooks and Official Records do not record word by word what has been said.

⁹⁹ See for example Brandner ‘Admissibility of Analogy’, part I. B.; Ferrari ‘Uniform Interpretation’, part. XIII; Schlechtriem *Commentary* (1998), art 7, para 34; Gebauer ‘Uniform Law’, p. 696 with references to others

¹⁰⁰ See Brandner ‘Admissibility of Analogy’, part I. B., footnote 8, which contains references to some authors

¹⁰¹ See Brandner ‘Admissibility of Analogy’, part I. B., footnote 9, which contains references to some authors; Povrzenic ‘Interpretation and gap-filling’, part 4.

¹⁰² See Brandner ‘Admissibility of Analogy’, I. B.

¹⁰³ See supra note 102

general principles. Another interpretation would be contrary to art 7 (1) CISG and its main goal, the promotion of uniformity.¹⁰⁴

3. Relationship between ‘analogy’ the ‘general principles’

After having discussed the admissibility of analogy as a gap-filler under the Convention, the next step is to examine the method of analogy in relation to the other gap-filling instrument: the recourse to general principles on which the CISG is based.

This includes not only the attempt to draw up a demarcation line between both gap-filling methods but also to investigate, whether or not a specific order of application has to be observed.

a) Comparative examination of analogy as a gap-filling method

To draw up a clear demarcation line between analogy and having recourse to the general principles on which the CISG is based is a difficult task.¹⁰⁵ Although some commentators believe that this distinction has merely a theoretical value¹⁰⁶, the basic differences should be known when being on the way to fill a particular gap in the Convention. Consequently, the following passage will briefly investigate how both gap-filling instruments can best be characterized and distinguished.

Starting point of the instrument of analogy is to search for provisions within the CISG, dealing with cases similar to the one not expressly settled within the Convention.

From the point of view of Professor Bonell an ‘inherently unjust’ test has to be applied in order to determine whether or not an analogical application of a specific provision of the Convention is possible. In his words, the case expressly governed by the provision of the CISG and the case in question must be so

¹⁰⁴ See Schlechtriem *Commentary* (1998), art 7, para 34 with reference to Hellner in footnote 55 supporting the same view

¹⁰⁵ See Schlechtriem *Commentary* (1998), art 7, para 43; Schlechtriem ‘Interpretation, gap-filling’, part II. 1.

¹⁰⁶ See Schlechtriem ‘Interpretation, gap-filling’, part II. 1.

analogous ‘that it would be inherently unjust not to adopt the same solution’.¹⁰⁷

The problem of such an ‘inherently unjust’ test is to find a common standard to determine when a certain case fulfills this criterion. Every person has a different understanding of what constitutes an inherently unjust situation.

Professor Honnold suggests another approach. His proposal focuses on the question, whether or not the cases in dispute are so analogous that the drafters ‘would not have deliberately chosen discordant results’.¹⁰⁸

Due to the above mentioned problem with Professor Bonell’s suggestion, the latter approach can be seen as more practicable.

Irrespective of which approach is preferred analogy merely means to apply a specific rule of the Convention to another provision¹⁰⁹ as long as there are no reasons limiting its analogical application like for example the restriction of this specific rule to a particular context.¹¹⁰

The difference between the two gap-filling methods has again been explained by Professor Bonell with the following words:

‘Recourse to ‘general principles’ as a means of gap filling differs from reasoning by analogy insofar as it constitutes an attempt to find solution for the case at hand not by mere extension of specific provisions dealing with analogous cases, but on the basis of principles and rules which because of their general character may be applied on a much wider scale.’¹¹¹

¹⁰⁷ See Rosenberg ‘The Vienna Convention’, p. 450

¹⁰⁸ See supra note 107

¹⁰⁹ See Schlechtriem *Commentary* (1998), art 7, para 34

¹¹⁰ See Felemegas ‘Article 7 and Uniform Interpretation’, p. 281

¹¹¹ See Bianca/Bonell *Commentary*, p. 80

Others suggest the following distinction:

If a principle is only contained in one rule of the CISG, then analogy is to be applied. However, if a principle underlies several rules, then gap-filling by means of general principles is necessary.¹¹²

Recapitulating, in case of an analogical application, a much closer relationship between the case at hand and a provision established for similar cases must exist, whereas general principles of the CISG can be applied on a much wider scale.¹¹³

b) Priority of analogy?

Another point of interest concerning analogy and the instrument of having recourse to the general principles on which the Convention is based is the issue of their order of application.

In particular, it is disputed whether or not the analogical application of a certain provision should be tried before filling a specific gap by means of general principles or in absence of the latter by applying domestic law to be determined by private international law.

Most commentators support the view that the first attempt to fill a certain question not expressly settled in the Convention is to be made by analogical application of specific provisions of the CISG.¹¹⁴

This order makes sense because of the fact that – as seen above – in case of an analogical application the discrepancy between the wording of the Convention and the unsolved question is less wide than in case of gap-filling by means of general principles. Consequently, I support the opinion, that gap-filling by analogical application should be tried first.

¹¹² See Schlechtriem 'Interpretation, gap-filling', part II. 1. with references to authors in footnote 30

¹¹³ See Povrzenic 'Interpretation and gap-filling', part 4. B.

¹¹⁴ See for example Felemegas 'Article 7 and Uniform Interpretation', p. 281; Bianca/Bonell *Commentary*, p. 78; Povrzenic 'Interpretation and gap-filling', part 4.; Ferrari 'Uniform Interpretation', part XIII; Zeller 'Four-Corners', chapter V. 5.

4. Gap-filling by means of general principles

After having outlined the method of filling gaps by analogical application, a further look shall be had on the gap-filling approach endorsed in art 7 (2) CISG. Thereby, main attention shall be turned on the question to what extent general principles have to be extracted from the CISG itself.

a) Different gap-filling approaches

There are mainly three different approaches to fill gaps ‘*praeter legem*’ which have to be distinguished:

aa) ‘True Code approach’

First of all, there is the ‘true Code approach’, for example chosen by the drafters of ULIS.¹¹⁵ It is based on the application of general principles on which the specific Code is based, a system well known in civil law systems in order to replace the complete body of pre-existing law.¹¹⁶ This means that a gap within a Code shall only be filled by looking at the Code itself, ‘including the purposes of the Code and the policies underlying the Code, but no further.’¹¹⁷

The supporters of this approach share the belief that a ‘true Code’ is self-sufficient, enabling any questions governed by this Code to be answered by having recourse to its framework.¹¹⁸

bb) ‘Meta-Code approach’

In contrast to the ‘true Code approach’, another gap-filling approach called the ‘meta-Code approach’, preferably used in common law countries, refers

¹¹⁵ See Chapter II. 2. on p. 7 of this dissertation for a discussion of the provisions of ULIS dealing with gap-filling

¹¹⁶ See Honnold ‘Uniform Law for International Sales’, p. 101; Povrzenic ‘Interpretation and gap-filling’, part 4. B.

¹¹⁷ See Felemegas ‘Article 7 and Uniform Interpretation’, p. 277

¹¹⁸ See Felemegas ‘Article 7 and Uniform Interpretation’, p. 277-278

to external legal principles of law and equity in order to supplement the provisions of a Code, unless this is expressly prohibited by the Code.¹¹⁹ The phrase ‘principles of law and equity’ is understood to refer to the general body of case-law.¹²⁰

It is not surprising that this approach is mainly to be found in common law countries due to the fact that their main source of law is to be found in case law. In contrast to that, the statutory law in common law systems appears to be very narrow and specific. Consequently, developments not specifically covered by a statute, are faced by enlarging or reshaping the principles on which older cases were based.¹²¹

cc) Approach endorsed in the CISG

In contrast to that, the draftsmen of the CISG agreed upon a different approach, reflected in art 7 (2) CISG. As seen above, this agreement has to be seen as a compromise agreement between two groups of thought and a combination of the foregoing approaches.

Bearing in mind the results of the interpretation of art 7 (2) CISG discussed in Chapter V. 2. and 3. b), gap-filling within the CISG has to be tried in accordance with the following order:

- (1) Analogical application of a specific provision of the CISG to an unsettled question;
- (2) Having recourse to general principles, on which the CISG is based;
- (3) Having recourse to domestic law determined by the applicable private international law.

¹¹⁹ See Felemegas ‘Article 7 and Uniform Interpretation’, p. 278

¹²⁰ See Honnold ‘Uniform Law for International Sales’, p. 101 in relation to § 1-103 (b) of the (U.S.A.) Uniform Commercial Code (U.C.C.)

¹²¹ See Felemegas ‘Article 7 and Uniform Interpretation’, p. 279-280; Ferrari ‘Gap-filling’, p. 81; Rosenberg ‘The Vienna Convention’, p. 442; Honnold ‘Uniform Law for International Sales’, p. 101

b) Nature and determination of general principles

The functioning of analogy as a means of filling gaps has already been examined, so that the following passage is going to concentrate on a detailed discussion of the nature and the determination of the general principles.

aa) General discussion

The importance of omitting the use of domestic law concepts in order to avoid diverging decisions within the jurisprudence was already mentioned more than once.

Consequently, this means that it should be tried – to the uttermost extent - to fill a gap within the CISG by having recourse to general principles on which the CISG is based before referring to domestic law.

However, this must not be overstretched. Art 7 (2) CISG still remains the starting point of each gap-filling problem which occurs and has to be observed without any exception. Compared to the English version of art 7 (2) CISG using the formulation ‘is based’, the French version can be seen as weaker because of its wording requiring gap-filling to be done in accordance with general principles ‘dont elle [the CISG] s’inspire’.¹²² Due to that little difference within the strength of these wordings, doubts can arise as to how closely the general principles have to be connected to the Convention itself. However, it has to be borne in mind that the English version of the CISG is prevailing when it comes to such doubts.¹²³ This can be explained by the fact that English was the language of the preliminary drafts as well as the deliberations in Vienna.¹²⁴ This means that the wording of art 7 (2) CISG contains a clear restriction as to the source from which the

¹²² See Magnus ‘General Principles’, part 4. a)

¹²³ See Magnus ‘General Principles’, part 4. a) as well as footnote 25

¹²⁴ See Magnus ‘General Principles’, part 4. a), footnote 25

general principles have to be extracted. They must be either expressly stated in the CISG itself or must result from it with sufficient clarity.¹²⁵

This requirement is not contrary to the main goal of the CISG to create uniformity on the field of international law for the sale of goods.

Although it appears to increase the recourse to domestic law concepts, the goal of uniformity would likewise be endangered without this criterion.¹²⁶ The absence of the necessity of such a close connection between the general principles and the Convention would likely end up in the application of inconsistent and even conflictive general principles leading to diverging jurisprudence. Hence, by applying a less restrictive approach in respect of extracting the general principles, nothing would be gained.

bb) Connection between the general principles and the CISG

However, there are still disputes about how close the general principles and the CISG itself have to be connected in order to apply them as a means of filling gaps in accordance with art 7 (2) CISG.

In general, the words ‘is based on’ in art 7 (2) CISG mean that there is no possibility to apply general principles developed from the law of all nations or one particular nation by means of a comparative legal analysis.¹²⁷ Due to a lack of connection between them and the Convention itself, the use of such principles would be contrary to art 7 (2) CISG and therefore constitute a breach of the CISG. Furthermore, it must be seen as an impossible task for a single person applying the CISG to conduct such an intensive comparative legal analysis.¹²⁸ Because of these difficulties, such a person could easily be pushed towards applying his own domestic solution to the specific case at hand instead of working with unfamiliar foreign laws. This would end up in a

¹²⁵ See supra note 122

¹²⁶ See supra note 122

¹²⁷ See Magnus ‘General Principles’, part 4. a); Brandner ‘Admissibility of Analogy’, part II. B. 3. b); Schlechtriem *Commentary* (1998), art 7, para 35

¹²⁸ See supra note 122

diverging application of the CISG and consequently endangering the goal of achieving uniformity.

It is however disputed, whether or not an exemption from this rule has to be made for particular general principles outside the CISG.

I believe that exemptions are not only possible but necessary to sustain the status of the CISG as a widely accepted body of uniform law.

Ulrich Magnus correctly states that an exemption has to be made ‘if and to the extent that general basic principles develop or are developed which are internationally coordinated and actually find general acceptance.’¹²⁹ In respect to such internationally accepted principles the argument regarding the problem to extract general principles by a comparative legal analysis can’t be brought forward. By demanding general principles to be internationally coordinated and accepted, this problem doesn’t exist. Moreover, it would be unwise not to observe the further development in international trade law. If newly developed principles on an international level aren’t considered when it comes to gap-filling, this would counteract the further process of unifying the law in this area. The CISG wouldn’t be up-to-date anymore soon and would finally lose its usefulness step by step.

These thoughts clearly show the need to also observe internationally coordinated principles when necessary, although the CISG wasn’t based on them initially.

But again it has to be emphasized that the use of general principles to be found outside the Convention depends on whether or not the principles are internationally accepted and have been created in such a manner.¹³⁰

Furthermore, this procedure is only admissible as long as there is no conflict with the CISG and its general principles. In case of a collision between

¹²⁹ See supra note 122

¹³⁰ See supra note 122

external and internal principles, priority must be given to the internal principles.¹³¹

cc) ‘Unidroit Principles’ and ‘Lando Principles’

As seen above, external general principles can be used to fill gaps praeter legem found in the CISG under very limited conditions. It is highly discussed, whether or not the Unidroit Principles of International Commercial Contracts¹³² (‘Unidroit Principles’) and the Principles of European Contract Law¹³³ (‘Lando Principles’) fulfill these criteria and can therefore generally be seen as an admissible source of general principles to be applied to fill a particular gap at hand.

The Unidroit Principles have first been published in 1994 and have been revised in the meanwhile, ending up in the new edition of the Unidroit Principles of 2004. They were drafted under the auspices of Unidroit. The legal scholars concerned with the development of the Unidroit Principles were mainly the same persons who had been involved in the drafting progress in relation to the CISG.¹³⁴

The principles themselves have been derived from common features of different modern legal systems as well as from important Conventions like for example the CISG and other international sets of terms such as the Incoterms.¹³⁵

Contrary to the CISG, they do not directly constitute a substantive uniform law.¹³⁶ They do also not create an international model law for eg domestic legislators, having the possibility to adopt or reject them.¹³⁷ According to the

¹³¹ See Gebauer ‘Uniform Law’, p. 701

¹³² The Unidroit Principles are available online at:
<http://www.unidroit.org/english/principles/contracts/main.htm>

¹³³ The Lando Principles are available online at:

http://frontpage.cbs.dk/law/commission_on_european_contract_law/

¹³⁴ See Felemegas ‘Article 7 and Uniform Interpretation’, p. 294

¹³⁵ See Magnus ‘General Principles’, part 6. a)

¹³⁶ See supra note 135

¹³⁷ See supra note 135

Preamble of the Unidroit Principles, they pursue three following intentions: First of all, they shall serve as an aid for parties to international commercial contracts. Secondly, they shall be used to help interpret and fill gaps in international uniform law instruments or when applicable law can't be determined. And finally, they may serve as a model to national and international legislators.

Amongst the commentators, two diverging groups of thought can be found regarding the admissibility of the Unidroit Principles as a possible source to extract general principles to be used to fill gaps in accordance with art 7 (2) CISG:

One group denies the possibility to have recourse to the Unidroit Principles when filling gaps within the CISG. They bring forward the argument that already the fact that the Unidroit Principles have been adopted later than the CISG shows that they cannot have any impact on the latter.¹³⁸ Also, the wording of art 7 (2) CISG seems to leave no place to allow this process.¹³⁹

This understanding neglects the possibility that the CISG can easily be based on a general principle contained in the Unidroit Principles due to the fact that both documents have – as we've seen above – a similar origin. It is not by hazard that the Unidroit Principles vastly correspond to the provisions of the CISG as well as to general principles to be extracted from it.¹⁴⁰ Furthermore, they pursue the same purpose, namely to unify the law.

The other group – which I am part of – affirms the Unidroit Principles as being an admissible source to fill gaps found in the CISG.¹⁴¹ However, this doesn't mean that the Unidroit Principles can be used for a gap-filling purpose without any limitations. Still, the particular provision of the Unidroit

¹³⁸ See Felemegas 'Article 7 and Uniform Interpretation', p. 306

¹³⁹ See Felemegas 'Article 7 and Uniform Interpretation', p. 307

¹⁴⁰ See Magnus 'General Principles', part 6. b)

¹⁴¹ See supra note 138

Principles must be an expression of a general principle on which the CISG is based.¹⁴²

The same applies to the Lando Principles as they also constitute an ‘excellent evidence’ of an internationally accepted solution.¹⁴³

However, it must be noted that when the Lando Principles differ from the Unidroit Principles on a particular issue, the latter should be given priority due to the fact that they were conceived for international contracts.¹⁴⁴

dd) Ways of extracting general principles from the CISG

In general, there are four generally accepted ways of extracting general principles from a Uniform Law Convention like for example the CISG.¹⁴⁵

The most self-evident way is of course to look for provisions explicitly claiming their general applicability to the Convention either because of their wording or because of their systematic position within the Convention.¹⁴⁶ It is arguable that these principles don’t constitute general principles contemplated in art 7 (2) CISG due to the fact that some commentators have defined the latter as principles hidden in the law and therefore not expressly mentioned.¹⁴⁷ From my point of view, this definition is not backed by the wording of art 7 (2) CISG. The words ‘on which it is based’ do not exclude expressly stated principles. In fact, the more general principles are expressly stated in CISG, the higher is the legal certainty and consequently also the uniform application of the CISG. The prevailing view amongst the authors

¹⁴² See Felemegas ‘Article 7 and Uniform Interpretation’, p. 306; Bonell ‘The Unidroit Principles and CISG’, part 3. (b)

¹⁴³ See Magnus in Staudinger/Magnus *Kommentar*, Einl., para 51

¹⁴⁴ See supra note 141 = Magnus in Staudinger/Magnus *Kommentar*, Einl., para 51

¹⁴⁵ See Magnus ‘General Principles’, part 4. b)

¹⁴⁶ Concerning the CISG, such principles can be found in the part ‘General Provisions’ like for example art 6 (principle of party autonomy), art 7(1) (principle of good faith) or art 11 (principle of lack of form requirements)

¹⁴⁷ See supra note 145

accepts such principles to be part of the general principles contemplated in art 7 (2) CISG.¹⁴⁸

Next way to derive general principles from the CISG is to locate common thoughts in several provisions of the Convention.¹⁴⁹ It is thereby necessary that these thoughts appear in more than one provision in order to differentiate between simple rules to be applied to a specific situation and those thoughts which underlie several provisions and can therefore be generalised.

However, it is sometimes also possible that a legal thought is subject to generalisation although it appears only in a single provision of the Convention.¹⁵⁰

Finally, general principles can be derived from the overall context of the Convention without being expressed anywhere in its provisions. They are to be assumed implicitly like for example the principle ‘pacta sunt servanda’ which becomes indirectly apparent out of the narrow conditions under which the obligor isn’t obliged to perform, listed in art 79 CISG.¹⁵¹

c) *Reference to domestic law as the last exit*

After having unsuccessfully tried to fill a gap *praeter legem* by analogy and then by having recourse to the general principles of the CISG, art 7 (2) CISG contemplates the possibility of gap-filling ‘in conformity with the law applicable by virtue of the rules of private international law’.

Although the possibility to have recourse to domestic law constitutes a huge danger to the main goal of the CISG to achieve and sustain a uniform application of the CISG, the wording of art 7 (2) CISG unmistakably opens the door for a homeward trend. Also a restrictive interpretative approach in respect of this paragraph, having in mind the principles of interpretation, especially the need to

¹⁴⁸ See for example Magnus ‘General Principles’, part 4. b); Schlechtriem *Commentary* (1998), art 7, para 36; Bianca/Bonell *Commentary*, art 7, note 2.3.2.2

¹⁴⁹ See supra note 145 for examples

¹⁵⁰ See supra note 145 for examples

¹⁵¹ See supra note 145 for examples

promote uniformity in the Convention's application, isn't able to completely disallow gap-filling by means of domestic law.¹⁵² However, recourse to the applicable national law must be avoided to the largest possible extent and is therefore to be seen as an ultima ratio, if the other gap-filling methods remain unsuccessful.¹⁵³ In this case however, one is not only allowed to fill the particular gap by virtue of the applicable national law but is obliged to do so.¹⁵⁴

VI. LIST OF GENERAL PRINCIPLES

After having investigated the gap-filling methodology of the CISG with its three main steps analogy, general principles and domestic law – to be observed in this order –, I want to try to give a brief overview over the general principles, which are discussed by the authors or by jurisprudence. The list will consist of general principles in terms of art 7 (2) CISG, which can be divided into four different categories: General principles–

- (1) expressly stated in the Convention (part 1.);
- (2) derived from the need to observe good faith (part 2.);
- (3) derived from other provisions of the Convention (part 3.);
- (4) to be found outside the Convention (part 5.).

In between, I will discuss some rules, which are sometimes seen as constituting general principles but fail to do so from my perspective (part 4.).

The purpose of identifying the general principles on which the CISG is based is in the first place to restrict the use of domestic law.

However, it must be pointed out that the value of the following list of general principles must not be overrated. First, the following passage mustn't be seen as a complete listing of all existing and generally accepted general principles due to the massive accumulation

¹⁵² See Felemegas 'Article 7 and Uniform Interpretation', p. 315 with references to other authors

¹⁵³ See Ferrari 'Gap-filling', p. 90; Felemegas 'Article 7 and Uniform Interpretation', p. 315

¹⁵⁴ See supra note 153

of jurisprudence and commentaries to this issue since the CISG was brought into force. Secondly, the use of the general principles outlined below can't be generalised. It always remains a question of the specific matter and the gap related thereto, whether or not one of these general principles can be applied to fill that particular gap.¹⁵⁵

Thus, by giving an overview of the actual state of affairs in respect of the existing general principles on which the CISG is based, the more ambitious goal – the promotion of the uniform application of the Convention – is not automatically achieved. A common understanding of the existing general principles can only be seen as a first step in this direction.

1. General Principles expressly stated in the CISG

Although the CISG doesn't provide an exhaustive list of all general principles on which it is based, a few of them are – more or less clearly – expressly stated within the CISG.

a) Principle of party autonomy, art 6 CISG

The first general principle I would like to mention is the one of party autonomy or – in other words – the principle of the priority of the parties' intention, enshrined in art 6 CISG.

Already embodied in ULIS, this general principle is also generally recognised in relation to the CISG and is at the same time seen as the most important general principle.¹⁵⁶ The reason for the huge importance of the principle of party autonomy can be derived from the fact that due to this principle, the parties to the contract can decide whether and to what extent the provisions of the CISG shall apply to their contractual relationship. Thus, art 6 CISG gives the Convention a dispositive character, resulting in a subsidiary role of the Convention in relation

¹⁵⁵ See Schlechtriem 'Interpretation, gap-filling', part II. 2.

¹⁵⁶ See for example Felemegas 'Article 7 and Uniform Interpretation', p. 284; 6, p. 12; Ferrari 'Gap-filling', p. 82

to the parties' intention.¹⁵⁷ This also means that the principle of party autonomy prevails over other general principles in terms of art 7 (2) CISG.¹⁵⁸

Consequently, the principle of party autonomy is sometimes also called the principle of 'prevalence of party autonomy'.¹⁵⁹

The principle of party autonomy is not only accepted amongst commentators but has been applied by courts of different countries as well.¹⁶⁰ An express reference to the non-mandatory status of the Convention can for example be found in Italian jurisprudence.¹⁶¹

In the decision rendered by the German Landgericht Stendal¹⁶² for example, the court stated that art 6 CISG, comprising the principle of party autonomy, validly allows the parties to a contract to exclude any provisions of the CISG by their agreement.

b) Principle of prevalence of usage, art 9 CISG

Another general principle, expressly stated in the CISG can be found in art 9 CISG. It contains the principle of taking into account known and largely observed usages or – in other words – the principle of prevalence of usage.¹⁶³

Again, the existence of this principle is undisputed.¹⁶⁴ It is often also called the principle of prevalence of usage.¹⁶⁵

Art 9 CISG is dealing with three different types of situations:¹⁶⁶

¹⁵⁷ See Ferrari 'Gap-filling', p. 82; Felemegas 'Article 7 and Uniform Interpretation', p. 284; 6, p. 12; Ferrari 'What Sources of Law', p. 330

¹⁵⁸ Felemegas 'Article 7 and Uniform Interpretation', p. 284; Ferrari 'Gap-filling', p. 82

¹⁵⁹ See for example Ferrari 'Gap-filling', p. 83; Ferrari 'What Sources of Law', p. 330

¹⁶⁰ See for example Belgium: *Hof van Beroep* [Appellate Court] Gent 15 May 2002, available online at <http://cisgw3.law.pace.edu/cases/020515b1.html>; Belgium: *Rechtbank van Koophandel Ieper* [District Court] 29 January 2001, available online at <http://cisgw3.law.pace.edu/cases/010129b1.htm>; Germany: *Landgericht* [District Court] Stendal 12 October 2000, available online at <http://cisgw3.law.pace.edu/cases/001012g1.html>; Italy: *Tribunale* [District Court] Rimini 26 November 2002, available online at <http://cisgw3.law.pace.edu/cases/021126i3.html>

¹⁶¹ See Cassazione civile, 19 June 2000, see, eg Oberster Gerichtshof, 15 October 1998, available at <http://cisgw3.law.pace.edu/cases/981015a3.html>

¹⁶² See supra note 160

¹⁶³ See for example Schlechtriem *Commentary* (1998), art 7, para 36; Magnus 'General Principles', part 5. b) (7)

¹⁶⁴ See Magnus 'General Principles', part 5. b) (7)

¹⁶⁵ See supra note 164

On the one hand, paragraph (1) is concerned with usages to which the parties have agreed as well as any practices established between them.

On the other hand, paragraph (2) sets out that the parties to the contract ‘are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.’

The importance of such a provision has to be seen in the fact that no law can reflect all existing special patterns, not to forget the need to embody future developments as well.¹⁶⁷

The wording of art 9 (2) CISG sets out very strict criteria for the application of trade usage in absence of any agreement of the parties. The trade usage must be widely known in international trade and regularly be observed so that it can be assumed that this pattern of conduct is part of the expectations of the parties in dispute.¹⁶⁸ In contrast to that, an autonomous interpretation of art 9 (1) CISG makes it obvious that usages in terms of this paragraph mustn’t be widely known nor internationally accepted.¹⁶⁹

Recapitulating, when the prerequisites enshrined in art 9 CISG are met, the specific usage prevails over the Convention.¹⁷⁰

Again, this principle has also been acknowledged by courts.¹⁷¹

Austrian decisions were confronted with the problem whether ‘Tegernsee’¹⁷² usages’ in respect to the cross-border timber trade constitutes a widely known

¹⁶⁶ See Honnold ‘Uniform Law for International Sales’, p. 124; Ferrari ‘What Sources of Law’, p. 332

¹⁶⁷ See Honnold ‘Uniform Law for International Sales’, p. 123

¹⁶⁸ See Honnold ‘Uniform Law for International Sales’, p. 127

¹⁶⁹ See Ferrari ‘What Sources of Law’, p. 333

¹⁷⁰ See Ferrari ‘What Sources of Law’, p. 335

¹⁷¹ See for example Italy: *Tribunale* [District Court] Rimini, November 26, 2002, available online at:

<http://www.unilex.info/case.cfm?pid=1&do=case&id=823&step=FullText>; Belgium: *Rechtbank*

Koophandel [District Court] Ieper 29 January 2001, available online at

<http://cisgw3.law.pace.edu/cases/010129b1.html>; Austria: *Oberster Gerichtshof* [Supreme Court], 21

March 2000, available at <http://cisgw3.law.pace.edu/cases/000321a3.html>; Austria: *Oberster Gerichtshof*

[Supreme Court], 15 October 1998, available at <http://cisgw3.law.pace.edu/cases/981015a3.html>

and regularly observed trade usage in terms of art 9 (2) CISG, which was finally approved.¹⁷³

c) *Principle of informality of declarations, art 11 CISG*

Moving further into examining general principles stated in the CISG, one needs to discuss art 11 CISG.

This article is expressly concerned only with the contract of sale, stating that it hasn't got to be concluded or evidenced by writing and is furthermore not subject to any other form requirements.¹⁷⁴

Although the scope of application of art 11 CISG is expressly restricted to the contract of sale, this article is seen to comprise the general principle that any declaration¹⁷⁵ may be made without observing requirements as to its form.¹⁷⁶

This opinion is shared by courts and other tribunals as well.¹⁷⁷

Besides the possibility to modify or terminate a contract of sale in any form,¹⁷⁸ it was even held that an implied termination of the contract is possible.

Only the narrowly construed exception of art 96 in conjunction with art 12 CISG must be observed,¹⁷⁹ according to which a contracting state can make a reservation as to the application of art 11 CISG. However, this exception applies only to the conclusion of the contract of sale and its evidence.¹⁸⁰

¹⁷² Tegernsee is a little town in Bavaria

¹⁷³ See Austria: *Oberster Gerichtshof* [Supreme Court], 21 March 2000, available at <http://cisgw3.law.pace.edu/cases/000321a3.html>; Austria: *Oberster Gerichtshof* [Supreme Court], 15 October 1998, available at <http://cisgw3.law.pace.edu/cases/981015a3.html>

¹⁷⁴ See the wording of art 11 CISG

¹⁷⁵ Such as the notice of lack of conformity or the declaration of contract avoidance, et cetera.

¹⁷⁶ See Schlechtriem *Commentary* (1998), art 7, para 36; Magnus 'General Principles', part 5. b) (8)

¹⁷⁷ See Compromex Arbitration, July 16, 1996, available online at <http://www.uc3m.es/cisg/rmexi2.htm>; Compromex Arbitration, April 29, 1996, available online at

<http://www.unilex.info/case.cfm?pid=1&do=case&id=258&step=FullText>; CLOUT case No. 176 [Austria: *Oberster Gerichtshof* [Supreme Court] 6 February 1996, available online at <http://cisgw3.law.pace.edu/cases/960206a3.html>]

¹⁷⁸ See Ferrari 'Gap-filling', p. 85

¹⁷⁹ See Schlechtriem *Commentary* (1998), art 7, para 36; Magnus 'General Principles', part 5. b) (8)

¹⁸⁰ See Magnus 'General Principles', part 5. b) (8)

2. The need for the observance of good faith, art 7 (1) CISG

As already seen above, art 7 CISG contains a notion of good faith. Other express references to the need for the observance of good faith are not existent.

After having discussed the notion of ‘good faith’ as an instrument of interpretation of the Convention,¹⁸¹ I will now have a closer look on its role in respect to art 7 (2) CISG and the general principles on which it is based.

a) ‘Good faith’ as a general principle of the CISG

According to the wording of art 7 (1) CISG¹⁸², good faith in international trade has to be observed only in relation to the interpretation of the CISG.

Consequently, it is questionable whether the observance of good faith also constitutes a general principle in terms of art 7 (2) CISG.

To start with, the drafting history of the Convention regarding the role of the notion of good faith in the CISG should be looked at.

There from, it gets apparent that the delegates concerned with the drafting process were divided on this issue.¹⁸³ Art 7 (1) constitutes a compromise between one group of delegates supporting a general rule directly imposing a duty on the parties to act in ‘good faith’ and another, opposing any reference to the principle of good faith in the Convention¹⁸⁴, arguing that this would lead to uncertainty due to the absence of a fixed meaning of the term ‘good faith’.¹⁸⁵

The compromise, enshrined in art 7 (1) CISG, finally restricted the principle of good faith to an instrument of interpretation.

But does this mean that good faith must be seen as a mere principle of interpretation and not more? An interpretative approach is necessary to solve this dilemma.

¹⁸¹ See Chapter IV. 3. on p. 18 of this dissertation

¹⁸² See supra note 39

¹⁸³ See Koneru ‘The International Interpretation’, part III. A.; Ferrari ‘Gap-filling’, p. 73; Honnold ‘Uniform Law for International Sales’, p. 98

¹⁸⁴ See Ferrari ‘Gap-filling’, p. 73-74; Honnold ‘Uniform Law for International Sales’, p. 98

¹⁸⁵ See Honnold ‘Uniform Law for International Sales’, p. 98

There are two different views adopted amongst scholars on this issue:

One group strictly sticks to the literal meaning of art 7 (1) CISG, i.e., they believe that good faith is only another criterion for judges and arbitrators to interpret the Convention's provisions.¹⁸⁶ Not only the wording of art 7 (1) CISG, but also its drafting history seems to speak to their favour.¹⁸⁷

On the other hand, there is another group supporting a broad interpretation of art 7 (1) CISG. They believe that good faith is not only an instrument for the interpretation of the Convention but addresses also the parties to the contract and the interpretation of their agreement. Mainly, they argue that the fact that there are several provisions throughout the CISG constituting a particular application of the general principle of good faith.¹⁸⁸ Examples therefore are art 16 (2) (b), 21 (2), 29 (2), 37, 40, 48, 49 (2), 64 (2), 82, 85 and 88 of the Convention.¹⁸⁹

Additionally, Peter Schlechtriem refers to the notion of reasonableness contained in several provisions of the CISG, such as expectations of 'reasonable' partners (art 8 (2) CISG), the 'reasonable reliance' (art 16 (2) (b) CISG) and a 'reasonable period of time' (art 39 (1) CISG).¹⁹⁰ For some authors, the existence of these references to the reasonableness standard 'inherently requires the application of good faith to the conduct of the parties'.¹⁹¹

In the end, the latter view can be seen as prevailing.¹⁹²

I also argue in favour of the latter view according to which good faith is also a general principle in terms of art 7 (2) CISG. From my perspective, the pervasive existence of the notion of good faith in respect of a party's behaviour makes another perception unsustainable.

¹⁸⁶ See Koneru 'The International Interpretation', part III. A.; Povrzenic 'Interpretation and gap-filling', part 3(B); Ferrari 'Gap-filling', p. 74

¹⁸⁷ See Koneru 'The International Interpretation', part III. A.

¹⁸⁸ See Povrzenic 'Interpretation and gap-filling', part 3(B); Ferrari 'Gap-filling', p. 75

¹⁸⁹ See Ferrari 'Gap-filling', p. 76, footnote 98; DiMatteo 'The Interpretive Turn', p. 319 footnote 88

¹⁹⁰ See Schlechtriem *Commentary* (2005), art 7, para 30, footnote 50; further references to reasonableness can be found in art 18(2), 34, 38(3), 48(1), 48(2), 49(2), 60(a), 63(1), 72, 75, 76(2), 79(1), 79(4), 85, 86(1), 86(2), 88(1), 88(2) CISG

¹⁹¹ See DiMatteo 'The Interpretive Turn', p. 319

¹⁹² See Magnus 'General Principles', part 5. b) (3); DiMatteo 'The Interpretive Turn', p. 319

Also the jurisprudence seems to prefer the latter perception of the role of good faith in the CISG.¹⁹³

b) Aspects of the general principle of good faith

Now that we have affirmed the role of good faith as a general principle of the CISG it is necessary to identify its content. Without any closer specification of this vague concept of good faith, the general principle of good faith wouldn't be of great help for the decision making process of judges.¹⁹⁴ The latter general principle would remain an inoperable tool.

In consequence, more detailed principles have to be extracted from the notion of good faith in order to obtain a helpful tool. There is however no clear-cut distinction between additional principles and aspects of good faith amongst commentators again due to the inherent vagueness of the term. This rather theoretical problem should not be overrated. The categorization of a principle as

¹⁹³ See for example Belgium: *Hof van Beroep* [Appellate Court] Gent 15 May 2002, available online at <http://cisgw3.law.pace.edu/cases/020515b1.html>; Germany: *Bundesgerichtshof* [Supreme Court] 9 January 2002, available online at <http://cisgw3.law.pace.edu/cases/020109g1.html>; Germany: *Bundesgerichtshof* [Supreme Court] 31 October 2001, available online at <http://cisgw3.law.pace.edu/cases/011031g1.html>; Belgium: *S.r.l. R.C. v. BVBA R.T.* [Antwerp Appellate Court], 1997/AR/1554, Jun. 27, 2001, available online at <http://cisgw3.law.pace.edu/cases/010627b1.html>; CLOUT case No. 297 [Germany: *Oberlandesgericht* [Appellate Court] München 21 January 1998, available online at <http://cisgw3.law.pace.edu/cases/980121g1.html>]; CLOUT case No. 251 [Switzerland: *Handelsgericht* [Commercial Court] Zürich 30 November 1998, available online at <http://cisgw3.law.pace.edu/cases/981130s1.html>]; Italy: *Corte di Appello* [Appellate Court] Milano 11 December 1998, available online at <http://cisgw3.law.pace.edu/cases/981211i3.html>; Mexico: *Compromex Arbitration Award* 30 November 1998, available online at <http://cisgw3.law.pace.edu/cases/981130m1.html>; CLOUT case No. 277 [Germany: *Oberlandesgericht* [Appellate Court] Hamburg 28 February 1997, available online at <http://cisgw3.law.pace.edu/cases/970228g1.html>]; Netherlands: *Rechtbank* [District Court] Arnhem 17 July 1997, available online at <http://cisgw3.law.pace.edu/cases/970717n1.html>; Germany: *Landgericht* [District Court] München 6 May 1997, available online at <http://cisgw3.law.pace.edu/cases/970506g1.html> (stating the same); CLOUT case No. 337 [Germany: *Landgericht* [District Court] Saarbrücken 26 March 1996, available online at <http://cisgw3.law.pace.edu/cases/960326g1.html>]; CLOUT case No. 166 [Germany: *Schiedsgericht* [Arbitral Tribunal] Hamburg 21 June 1996, available online at <http://cisgw3.law.pace.edu/cases/960621g1.html>]; CLOUT case No. 136 [Germany: *Oberlandesgericht* [Appellate Court] Celle 24 May 1995, available online at <http://cisgw3.law.pace.edu/cases/950524g1.html>]; ICC *Court of Arbitration*, case No. 8128/1995 of 17 November 1995, available online at <http://cisgw3.law.pace.edu/cases/958128i1.html>; Hungary: *Court of Arbitration Award* No. Vb 94124 of 17 November 1995, available online at <http://cisgw3.law.pace.edu/cases/951117h1.html>; CLOUT case No. 154 [France: *Cour d'appel* [Appellate Court] Grenoble 22 February 1995, available online at <http://cisgw3.law.pace.edu/cases/950222f1.html>]

¹⁹⁴ See Schlechtriem *Kommentar* (2000), art 7, para 50

being part of good faith or as a self-contained general principle is of no real relevance in practice.

Bearing this problem in mind, the general principle of good faith contains at least the following aspects:

aa) Principle of reasonableness

As seen above, the basis for the general principle of good faith should be – amongst others – the many provisions of the CISG referring to the reasonable standard.¹⁹⁵ Consequently, it is logical to examine the existence of a principle of reasonableness being part of the general principle of good faith.¹⁹⁶

However, this is not done continuously by all commentators. Some believe the principle of reasonableness to be a principle of its own.¹⁹⁷ The little importance of these diverging views has already been mentioned.

Irrespective of this classification, there is a common understanding that these references to the standard of reasonableness constitute a general principle according to which the parties to a contract have to conduct themselves in accordance to the standard of the reasonable person.¹⁹⁸

These references to the standard of reasonableness can be categorized into two different groups:

There are several references within the CISG which directly address the parties to the contract as subjects with the qualities of a ‘reasonable person’.¹⁹⁹

The other group of references demands the parties to perform a particular action within a ‘reasonable’ period of time.²⁰⁰

¹⁹⁵ In total 38 references to the reasonableness standard in the CISG

¹⁹⁶ See Schlechtriem *Commentary* (2005), art 7, para 30 in note 50; Koneru ‘The International Interpretation’, part III. A.

¹⁹⁷ See for example Felemegas ‘Article 7 and Uniform Interpretation’, p. 287; Magnus ‘General Principles’, part 5. b) (5)

¹⁹⁸ See for example Felemegas ‘Article 7 and Uniform Interpretation’, p. 287-288; Schlechtriem *Kommentar* (2000), art 7, para 53

¹⁹⁹ See for example art 8 (2), 25, 35 (2) (b), 60 (a), 79 (1), 85, 86 (1), 88 (2) CISG

Irrespective whether the notion of reasonableness refers to, for example, time limits or a party's conduct, art 8 CISG has to be applied in order to interpret the parties conduct.

Paragraph (1) of art 8 CISG states that primarily a party's conduct has to be interpreted according to its intent as long as the other party knew or could not have been unaware of that intent. However, the importance of this rule in practice is not very significant, because of its inherent problems to prove the parties' intentions.²⁰¹

Consequently, most interpretative problems will be solved by applying paragraph (2), stipulating the general rule that an objective standard based on the view of a reasonable person in the same situation has to be applied.²⁰² Thereby, it is ensured that a good commercial practice of international trade is observed.

This means that although a party's conduct has to be interpreted primarily in accordance with its intent (art 8 (1) CISG), most cases will be resolved by applying art 8 (2) CISG and its reasonableness standard.

These findings clearly show that the assumption of some legal scholars that the principle that a party's conduct is to be interpreted primarily according to its objective meaning is expressed in art 8 (1) CISG,²⁰³ is wrong.

By the way, the rule embodied in art 8 (2) CISG is restricted to the extent that noticeable relevant circumstances in terms of art 8 (3) CISG or an international usage in accordance with art 9 CISG prevail in the particular case.²⁰⁴

Even though there is this widespread recognition of the principle of reasonableness, it is still not certain what kind of reasonableness one must

²⁰⁰ See for example art 18 (2), 33 (c), 39 (1), 43 (1), 47 (1), 49 (2) (a), 63 (1), 64 (2) (b), 65 (1), 65 (2), 75 CISG

²⁰¹ See Honnold 'Uniform Law for International Sales', p. 117

²⁰² See Magnus 'General Principles', part 5. b) (5)

²⁰³ See for example Schlechtriem *Commentary* (1998), art. 7, para 38

²⁰⁴ See supra note 202

take into account in order to meet the necessary standards.²⁰⁵ While solving this problem the international character of the Convention has to be borne in mind. As a consequence, only internationally accepted standards can be of relevance. If courts would apply standards recognized in a restricted area only, the goal of a uniform application of the Convention would again be endangered.

bb) ‘Venire contra factum proprium’ – ‘estoppel’

A first aspect of good faith can be seen in the – amongst lawyers from civil law countries – well known Latin phrase ‘venire contra factum proprium’.²⁰⁶ The pendant to this phrase in countries based on a common law system is the principle of ‘estoppel’.²⁰⁷

While the Latin phrase, used in civil law systems, gives immediate indications as to the meaning of it (translated into English, ‘venire contra factum proprium’ merely means ‘actions contrary to prior conduct’), the principle of estoppel needs further explanations.

The reliance based estoppel as the only type of estoppels relevant in connection with the CISG,²⁰⁸ was defined by Judge Lord Denning as follows: ‘[W]hen a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.’²⁰⁹

Recapitulating, both approaches constitute a principle prohibiting actions of a party to the contract of sale contrary to its prior conduct.

However, estoppel in contrast to the prohibition of venire contra factum proprium further demands a reliance situation. That’s why authors with a

²⁰⁵ See Felemegas ‘Article 7 and Uniform Interpretation’, p. 288

²⁰⁶ See for example Schlechtriem *Commentary* (1998), art 7, para 37; Magnus ‘General Principles’, part 5. b) (3)

²⁰⁷ See Ferrari ‘Gap-filling’, p. 83

²⁰⁸ Four categories of estoppels in English/American Law: estoppel by record, estoppel by deed, reliance-based estoppels and laches (for more details, see <http://en.wikipedia.org/wiki/Estoppel#Definition>)

²⁰⁹ See *Moorgate Mercantile v Twitchings* [1976] 1 QB 225, CA at 241

civil law background use the term ‘reliance protection’ instead of estoppel and simultaneously admit that the demarcation line between both approaches is blurred.²¹⁰

Consequently, it has to be distinguished between these two (slightly) different principles when filling gaps in accordance with art 7 (2) CISG.

However, they can both be extracted from more or less the same provisions of the CISG:

Art 16(2) (b) CISG, establishing the irrevocability of an offer in case the offeror has created a situation of reliance, as well as art 50 2nd sentence CISG, dealing with the loss of the buyer’s right to claim price reduction because of an unjustifiable rejection of cure by the seller, can be seen as provisions, from which the principle prohibiting actions contrary to prior conduct is to be deduced.²¹¹ Furthermore, also art 80 CISG, showing more generally that a party may not take advantage of the failure of the other party, caused by the first party, is seen to be a source of this legal thought.²¹²

As to the estoppel principle or the principle of reliance protection, additionally to art 16 (2) (b) CISG, the provisions dealing with the buyer’s possibility to rely on the seller’s special skills (art 35(2)(b) CISG) and the exclusion of any liability for title defects in case the seller has manufactured the goods in accordance with the buyer’s specifications (art 42(2)(b) CISG) can be seen as examples proving the existence of such an inherent general principle.²¹³

These examples show that the Convention is based on both concepts which can consequently be applied to similar situations.

There are nevertheless voices amongst commentators as well as courts, who deny that this thought is part of the general principles in terms of art 7 (2)

²¹⁰ See Magnus ‘General Principles’, part 5. b) (4)

²¹¹ See Magnus ‘General Principles’, part 5. b) (3)

²¹² See Schlechtriem *Commentary* (1998), art 7, para 37; Magnus ‘General Principles’, part 5. b) (3)

²¹³ See Magnus ‘General Principles’, part 5. b) (4)

CISG.²¹⁴ One court for example argued that estoppel is a matter not governed by the CISG and must therefore be resolved according to domestic law rather than general principles of the CISG.²¹⁵

This decision is opposed by a wide range of case-law, regarding the principle of estoppel as a manifestation of the principle of good faith.²¹⁶

From my perspective, opinions denying the prohibition of actions contrary to prior conduct as being one of the general principles on which the Convention is based, neglect the existence of this thought in several provisions of the CISG and is therefore not to be supported.

cc) Prohibition of the misuse of rights

Another aspect of good faith is certainly the prohibition of the misuse of rights.²¹⁷ Besides art 80 CISG, there is also art 29 (2) 2nd sentence CISG which can be seen as containing an expression of this principle. While art 80 CISG restricts the exertion of legal rights arising from the failure of the other party to perform, in case such failure was caused by the first party, ‘art 29 (2) 2nd sentence CISG prohibits the abuse of a formal legal position’.²¹⁸

There is no case law to this principle on the CISG. Although there exists a decision acknowledging the existence of this principle in relation to ULIS – the predecessor of the CISG – this judgment is of little help. Since the gap-filling approaches embodied in the CISG on the one hand and in ULIS on the other hand are different from each other (no recourse to domestic law in

²¹⁴ See Ferrari ‘Gap-filling’, p. 83; Honnold ‘Uniform Law for International Sales’, p. 105

²¹⁵ See Netherlands: *Arrondissementsrechtbank* [District Court] Amsterdam 5 October 1994, available online at <http://cisgw3.law.pace.edu/cases/941005n1.html>

²¹⁶ See for example Russia: *Arbitration Award* case No. 302/1996 of 27 July 1999, available online at <http://cisgw3.law.pace.edu/cases/990727r1.html>; CLOUT case No. 230 [Germany: *Oberlandesgericht* [Appellate Court] Karlsruhe 25 June 1997, available online at <http://cisgw3.law.pace.edu/cases/970625g1.html>]; CLOUT case No. 94 [Austria: *Vienna Arbitration Award*, case No. SCH-4318 of 15 June 1994; available online at <http://cisgw3.law.pace.edu/cases/940615a4.html>]; CLOUT case No. 93 [Austria: *Vienna Arbitration Award*, case No. SCH-4366 of 15 June 1994; available at <http://cisgw3.law.pace.edu/cases/940615a3.html>]; Netherlands: *Gerechtshof* [Appellate Court] ‘s-Hertogenbosch 26 February 1992, available online at <http://cisgw3.law.pace.edu/cases/920226n1.html>

²¹⁷ See Schlechtriem *Commentary* (1998), art 7, para 37; Magnus ‘General Principles’, part 5. b) (3)

²¹⁸ See Magnus ‘General Principles’, part 5. b) (3)

ULIS; see above in Chapter II., 2.), the case-law on ULIS can only be used to a limited extent.²¹⁹

As said above, there are several other issues which could further be classified as aspects of the principle of good faith.²²⁰ I decided to name only those aspects, which are widely accepted as being part of good faith. Other aspects, lying in the grey zone between good faith and independent general principles, will be discussed in part 3. of this chapter.

c) Issues outside the principle of good faith

In contrast to that, there are at the same time aspects which can neither be categorized as being an aspect of good faith nor be seen as a self-contained general principle.

These issues are to be discussed in the following passage.

aa) Acting as a prudent businessman

Some scholars believe that the principle of good faith also establishes a duty of the parties to the contract of sale to act in conformity with the standards of a prudent businessman in international trade.²²¹

From my point of view, the existence of such a principle should be denied.²²² First of all, it is much too unspecific in order to be of great help in promoting a uniform application of the CISG. What standards are decisive in order to decide what amounts to be in conformity of a prudent businessman? The applicants of the CISG would be pushed towards their national standards to try and fill this lack of specification.

²¹⁹ See Schlechtriem *Commentary* (1998), art 7, para 39

²²⁰ For example the principle of co-operation, the favour contractus principle and the principle of mitigation; see therefor Mather 'Choice of Law', p. 156

²²¹ See references to scholars in Magnus 'General Principles', part 5. b) (3), footnote 44

²²² See Magnus 'General Principles', part 5. b) (3), arguing in the same direction

Secondly, art 9 (2) CISG and its inherent principle of taking into account known and largely observed usages²²³ also establishes standards for the conduct of the parties. To the extent that there is an internationally known usage of how a businessman has to behave, it has to be taken into account by virtue of art 9 CISG.

Recapitulating, the principle to act in conformity of a prudent businessman is not only incompatible in respect of the goal of a uniform application of the Convention but also in relation to art 9 CISG and its standards under which a parties' conduct must be of a specific nature.

bb) Additional obligations of a positive character

Finally, the issue of imposing on the contract parties additional obligations of a positive nature has to be mentioned in general.

There are some voices in the academic literature, who argue in favour of the possibility to extract positive obligations from the notion of good faith such as for example acting in accordance with good faith in the bargaining and formation process.²²⁴

From my perspective, the extraction of additional obligations based on good faith must be rejected, without questioning the role of good faith as a general principle in terms of art 7 (2) CISG.²²⁵ Only in relation to obligations already embodied in text of the Convention itself, the principle of good faith sets out standards for their performance.

3. Principles to be deduced from other provisions of the CISG

Now that general principles expressly stated in the Convention as well as those to be derived from the need to observe good faith in international trade have been discussed, I will go on with the third group of general principles to be deduced from other provisions of the CISG.

²²³ See part VI. 1. b) on p. 38 of this dissertation

²²⁴ See references to scholars, made by Ferrari in Ferrari 'Gap-filling', p. 77, footnote 101

²²⁵ Same opinion shared in Ferrari 'Gap-filling', p. 76-77

a) *Pacta sunt servanda*

The first general principle I want to mention is the principle of *pacta sunt servanda*, i.e. the principle that the contract is binding to the parties.

Although this basic rule isn't expressly mentioned in the CISG, it is evident that it is of existence.²²⁶ This can be derived from several provisions of the CISG like for example art 30 and art 53 CISG, embodying the duty to deliver and the duty to effect payment.²²⁷

Furthermore, the art 71-73 and 79 CISG, containing narrowly construed circumstances under which the contract can be avoided, wouldn't make sense without the basic rule that the parties are bound to their contractual agreement.²²⁸

The fact that the parties, due to art 6 CISG, have the possibility to derogate from the just mentioned provisions doesn't influence this result. It rather enforces the rule that the contract, reflecting the parties' will, should be enforced to the most possible extent.²²⁹

b) *Favor contractus principle*

Another widely recognized general principle, to be derived from several provisions of the Convention, is the *favor contractus* principle.²³⁰ This doesn't merely reflect the fact that once the parties have agreed upon a contract of sale, they are bound by it and are in general obliged to perform their duties arising out of it. Rather, this is the result of the CISG giving special weight to the existence of the contract of sale. Whenever possible, the contract must be upheld. Solutions in favor of the contract must be given priority over the premature termination of it on the initiative of one of the parties.²³¹

²²⁶ See Magnus 'General Principles', part 5. b) (2); Sica 'Gap-filling in the CISG', p. 16

²²⁷ See Magnus 'General Principles', part 5. b) (2)

²²⁸ See supra note 227

²²⁹ See Sica 'Gap-filling in the CISG', p. 16

²³⁰ See for example Schlechtriem *Commentary* (2005), art 7, para 30; Felemegas 'Article 7 and Uniform Interpretation', p. 288; Magnus 'General Principles', part 5. b) (9)

²³¹ See Felemegas 'Article 7 and Uniform Interpretation', p. 288; Magnus 'General Principles', part 5. b) (9)

The fact that a premature termination of the contract has to be seen as the last resort is an important issue for the creation of a positive environment in respect of the functioning of international trade as a whole. Every tradesperson, especially in international trade, requires a certain degree of certainty in relation to the other party's compliance with the contract terms in order to be able to do a proper business. As a consequence, I believe that the CISG wouldn't have had such a great success without embodying this general principle.

There are several provisions reflecting the idea of upholding the contract to the furthest possible extent.

The provisions dealing with contract avoidance are certainly the most evident source. First of all, according to art 49 (1) (a), 64 (1) (a) and 72 (1) CISG, a party may declare the contract avoided only if the other party's breach of contract amounts to be fundamental as defined in art 25 CISG. Other circumstances under which the art 49 and 64 CISG permits the avoidance of a contract are similarly narrowly construed. Art 49 (1) (b) in conjunction with art 47 (1) CISG in case of non-delivery as well as art 64 (1) (b) in conjunction with art 63 (1) CISG in case of failure to pay or to take delivery of the goods demand that an additional period of time has to be fixed to give the party in breach a further possibility to perform its obligations. Furthermore, art 51 (1) CISG restricts these rights to parts of the contract only. Finally, also art 26 and 48 CISG can be mentioned in order to prove the existence of such a general principle.

The general principle of upholding the contract is also recognised in the jurisprudence. One court expressly referred to this principle by stating that 'the CISG establishes the preference of the preservation of the contract: in case of doubt, the contract shall also be preserved in case of disturbances, while the avoidance of the contract shall be exceptional'.²³² Another decision is known emphasizing contract avoidance as an ultima ratio remedy.²³³

²³² See CLOUT case No. 248 [Switzerland: *Bundesgericht* [Supreme Court] 28 October 1998, available online at <http://cisgw3.law.pace.edu/cases/981028s1.html>]

²³³ See Austria: *Oberster Gerichtshof* [Supreme Court] 7 September 2000, available online at <http://cisgw3.law.pace.edu/cases/000907a3.html>

c) *Principle of loyalty*

A Helsinki Court of Appeals dealt with the importance of continuation of the sales contract within another principle, confirmed as one of the principles on which the Convention is based: the principle of loyalty.²³⁴

This principle is also recognised amongst commentators²³⁵ and barely means ‘that a party cannot take a completely singular view of its own interest to the exclusion of the other, having in some circumstances to take account of those of the other party.’²³⁶ In essence, both parties owe one another the duty to act in favor of the preservation of the contract.²³⁷ There from, the above mentioned court assumed an implied duty to continue a sales relationship beyond the particular individual sales contract. The case was about a seller who abruptly ended its trade relationship with the buyer. The court decided that after the parties had done business for two years, the buyer's ‘operations cannot be based on a risk of an abrupt ending of a contract.’²³⁸ As a consequence, the seller wasn’t able to stop delivering goods to the buyer despite the absence of any contract being in place between the parties, because, from the perspective of the court, the buyer had ‘obtained de facto exclusive selling rights’.²³⁹

d) *Principle of co-operation*

Another widely accepted general principle, closely related to the general principle of good faith,²⁴⁰ is the principle of co-operation.

Although the Supreme Court of Germany held that the general principle of good faith leads to the duty of the parties to cooperate with, the general principle of

²³⁴ See Finland: *Helsingin Hovioikeus* [Court of Appeals][HO] S00/82, Oct. 26, 2000 (Fin.), available online at <http://cisgw3.law.pace.edu/cases/001026f5.html>

²³⁵ See DiMatteo ‘The Interpretive Turn’, Di Matteo, p. 315-316

²³⁶ See Amissah ‘The Autonomous Contract’, part 2.3.4

²³⁷ See DiMatteo ‘The Interpretive Turn’, p. 316

²³⁸ See supra note 234

²³⁹ See supra note 234

²⁴⁰ See therefor Germany: *Bundesgerichtshof* [Supreme Court] 31 October 2001, available online at <http://cisgw3.law.pace.edu/cases/011031g1.html>

co-operation is mostly seen as a principle on its own,²⁴¹ only closely related to good faith.

It can be deduced from several ancillary duties provided in the Convention in addition to the main obligation of the parties to perform.²⁴² Mainly, one has to mention the buyer's duty to accept cure by the seller, enshrined in art 34, 37, 48 CISG, the duty of a party to mitigate the loss of the other party (art 77 CISG) and the duty to preserve goods to be returned as set out in art 85, 86 CISG.²⁴³

These ancillary duties of the parties allow the conclusion that the Convention expresses the general principle that both parties are held to enable the other party to perform and not to hinder the sales transaction.²⁴⁴

It is however argued whether this general principle also includes a general duty to communicate information needed by the other party. Although the majority of the scholars argue in favor of such a duty,²⁴⁵ there are also critical voices.²⁴⁶ The fact that the provisions of the CISG embody many duties to notify – directly or indirectly – the other party, doesn't solve this discussion. On the one hand, there are scholars, doubting the existence of a general duty to communicate information needed by the other party precisely because of this fact. They feel reluctant because each single duty of the Convention to notify the other party is regulated in great detail.²⁴⁷ On the other hand, one has to bear in mind that the draftsmen of the CISG couldn't foresee all possible circumstances under which a duty to notify the other party is required.²⁴⁸

²⁴¹ See Schlechtriem *Commentary* (2005), art 7, para 30; Felemegas 'Article 7 and Uniform Interpretation', p. 288; Magnus 'General Principles', part 5. b) (11)

²⁴² See for a list of provisions from which the principle to cooperate can be deduced: Felemegas 'Article 7 and Uniform Interpretation', p. 288, footnote 662; Magnus 'General Principles', part 5. b) (11)

²⁴³ See also art 60 (a) CISG

²⁴⁴ See Felemegas 'Article 7 and Uniform Interpretation', p. 288; Magnus 'General Principles', part 5. b) (11)

²⁴⁵ See Felemegas 'Article 7 and Uniform Interpretation', p. 288; Schlechtriem *Kommentar* (2000), art 7, para 54; Mather 'Choice of Law', p. 156; Honnold 'Uniform Law for International Sales', p. 106-107

²⁴⁶ See Magnus 'General Principles', part 5. b) (11)

²⁴⁷ See supra note 246

²⁴⁸ See Honnold 'Uniform Law for International Sales', p. 106, arguing in the same direction

I believe that the acceptance of a general duty to communicate information needed by the other party is not contrary but rather predetermined by several duties within the CISG to notify the other party.

The decision of the German Supreme Court supports this view, referring to the ‘general obligations of cooperation and information of the parties’.²⁴⁹

e) Principle of fair trading

Another general principle of the CISG, which is sometimes discussed as one of the variants of the general principle of good faith,²⁵⁰ is the principle of fair trading.²⁵¹

This principle is mainly derived from art 40 CISG, stating that the seller loses the right to rely on certain legal positions in case of a lack of conformity of the goods, which he didn’t disclose although he was aware of or could not have been unaware of the discrepancy.

References to the principle of fair trading can mostly be found in the jurisprudence. It was for example held by an arbitration tribunal that ‘[a]rticle 40 is an expression of the principles of fair trading that underlie also many other provisions of the Convention, and it is by its very nature a codification of a general principle’.²⁵² The tribunal asserted that even if art 40 CISG does not directly apply to an unconformity under a particular contractual warranty clause, the principle of fair trading, embodied in art 40 CISG, is to be indirectly applied to this situation by virtue of art 7 (2) CISG.²⁵³

Another court decision argued that, due to the principle embodied in art 40 CISG, a negligently acting buyer deserves more protection than a seller

²⁴⁹ See supra note 240

²⁵⁰ See therefor Koneru ‘The International Interpretation’, part III. A.

²⁵¹ See for example Ferrari ‘Gap-filling’, p. 88

²⁵² See CLOUT case No. 237 [Sweden: Stockholm Chamber of Commerce *Arbitration Award* of 5 June 1998, available online at <http://cisgw3.law.pace.edu/cases/980605s5.html>]

²⁵³ See in supra note 252 as well as Honnold ‘Uniform Law for International Sales’, p. 88-89

committing fraud.²⁵⁴ In consequence of this allegation, the court decided that the seller's liability wasn't excluded in accordance with art 35 (3) CISG because of the latter having misrepresented the age and the mileage of a car, although the buyer couldn't have been unaware of the lack of conformity.²⁵⁵

f) Imputation of third party's conduct and knowledge

Having a closer look on the liability of the parties to the contract of sale, it is important to investigate their responsibility for a third party's conduct or knowledge.

It is for example unclear whether a declaration has been received by a party of the contract delivered to an employee of this party or whether the knowledge of a person acting on behalf of a party eg in relation to the lack of conformity of the goods has to be imputed to this party.²⁵⁶

To decide on this questions, art 79 (1) and (2) CISG is of great value.

Paragraph (2) of this provision embodies the rule that a party is liable for the conduct of an independent third party²⁵⁷ engaged for the performance of the contract, unless one of the exemptions of art 79 (2) CISG is fulfilled.

Additionally, art 79 (1) CISG contemplates a party's liability for the conduct of its own people, assisting the performance of the contract.

It is accepted that these rules embodied in art 79 (1) and (2) CISG allow the conclusion that the Convention is based on the general principle that a party to the contract is liable for the conduct and knowledge of its own people as well as such third persons whom the party uses to carry out the contract.²⁵⁸

²⁵⁴ See CLOUT case No. 168 [Germany: *Oberlandesgericht* [Appellate Court] Köln 21 May 1996, available online at <http://cisgw3.law.pace.edu/cases/960521g1.html>]; Ferrari 'Gap-filling', p. 89

²⁵⁵ See supra note 254 as well as Ferrari 'Gap-filling', p. 89

²⁵⁶ See Magnus 'General Principles', part 5. b) (22)

²⁵⁷ It has to be distinguished between an independent third party under art 79 (2) CISG and a person for whom the party is absolutely responsible, being part of his personnel risk in terms of art 79 (1); see therefor Schlechtriem *Commentary* (2005), art 79, para 25-29

²⁵⁸ See Magnus 'General Principles', part 5. b) (22); Schlechtriem *Commentary* (2005), art 79, para 29

By the way, it must be noted that the imputation of a third person's action which constitutes a legal transaction is an issue governed by the applicable domestic law dealing with agency matters.²⁵⁹

g) Principle of full compensation

The next issue which is important to be discussed thoroughly because of its several disputed aspects, is about the compensation of damages suffered by one party in consequence of the wrongdoing of the other party.

aa) General overview

In the art 45 (1) and 61 (1) (b) CISG, the Convention orders that if a party is in breach of any obligation under the particular contract or contained in the Convention, the other party is entitled to claim damages. From art 74 to 76, 78, 84, 85, 86, 88 (3) CISG, it gets obvious that the CISG contains the concept of full compensation of the incurred damages. This liability of the party in breach is only excluded by the different scenarios contemplated in art 79 CISG.

It is widely recognized that these facts allow the assumption that the CISG is based on a general principle of full compensation²⁶⁰ to be applied even in relation to the breach of 'additionally stipulated or implied further obligations'.²⁶¹

The principle of full compensation also applies to consequential damages, unless art 74 2nd sentence CISG, embodying a restricted recoverability limited to foreseeable damages only, applies.²⁶²

The principle of full compensation is not only accepted amongst legal scholars but has also been positively documented in the jurisprudence.²⁶³ One

²⁵⁹ See Magnus 'General Principles', part 5. b) (22)

²⁶⁰ See Magnus 'General Principles', part 5. b) (12); Schlechtriem *Commentary* (2005), art 7, para 30; Ferrari 'Gap-filling', p. 85

²⁶¹ See Magnus 'General Principles', part 5. b) (12)

²⁶² See Schlechtriem *Commentary* (2005), art 7, para 30

court however restricted the applicability of this principle to cases where the contract of sale has been declared avoided by one of the parties. Under this premise, the court held that the CISG ‘follows the principle of damages equal to the loss suffered’ contemplated in art 74 CISG.²⁶⁴ In the absence of such a declaration, ‘the calculation of damages under [a]rt 74 CISG can be based only on maintenance and performance of the contract’.²⁶⁵ This restrictive interpretation of art 74 CISG is evidently contrary to the wording of this provision. There is no indication why art 74 CISG stating that damages ‘consist of a sum equal to the loss’ shall not apply without restrictions when the contract hasn’t been declared avoided. Also a systematic interpretation discloses no evidence therefor.

bb) Payment of interest

After having ascertained the principle of full compensation as a general principle in terms of art 7 (2) CISG, it is necessary to specify its relationship to the issue of payment of interest.

There are mainly three questions surrounding this issue, which I will discuss in the following passage:

- (1) First of all, it is controversially discussed whether the fact that a party is entitled to interest on a sum, which the other party has failed to pay constitutes a general principle on its own or is part of the more general principle of full compensation.

I believe that it can’t be seen as general principle on its own.²⁶⁶ The obligation to pay interest on any sum in arrears, merely a repetition of

²⁶³ See for example Austria: *Oberster Gerichtshof* [Supreme Court] 9 March 2000, available online at <http://cisgw3.law.pace.edu/cases/000309a3.html>; CLOUT cases Nos. 93 [Austria: *Vienna Arbitration Award*, case No. SCH-4366 of 15 June 1994; available at <http://cisgw3.law.pace.edu/cases/940615a3.html>] and No. 94 [Austria: *Vienna Arbitration Award*, case No. SCH-4318 of 15 June 1994; available at <http://cisgw3.law.pace.edu/cases/940615a4.html>]

²⁶⁴ See Austria: *Oberster Gerichtshof* [Supreme Court] 9 March 2000, available online at <http://cisgw3.law.pace.edu/cases/000309a3.html>

²⁶⁵ See *supra* note 264

²⁶⁶ See for the opposite opinion for example Schlechtriem *Kommentar* (2000), art 7, para 52; Ferrari ‘Gap-filling’, p. 88

art 78 CISG, is too specific in order to be applied on a wider scale. As a consequence, the obligation doesn't meet the necessary standard to be a general principle in terms of art 7 (2) CISG on its own. It is one aspect of the principle of full compensation as the principle, underlying the buyer's and seller's remedies.

This opinion is supported by authors²⁶⁷ as well as by the jurisprudence.²⁶⁸

- (2) Besides the categorization of the obligation to pay interest on sums in arrears, it must be discussed according to which rules the point of accrual of interest is to be determined.

There are mainly two diverging opinions on this specific issue.

One group of thought believes that interest is to be paid from the date the payment was due without requiring any formal notice to the debtor in default.

This view, shared by various legal scholars²⁶⁹ and courts²⁷⁰, is opposed by another group of thought, demanding a formal notice to the debtor before one is entitled to interest.²⁷¹

From my perspective, the former point-of-view stating that interest is to be paid from the date the payment is due without requiring a formal notice to the debtor is preferable.

²⁶⁷ See Felemegas 'Article 7 and Uniform Interpretation', p. 285 in footnote 646

²⁶⁸ See for example CLOUT Case No. 94 [Austria: *Vienna Arbitration Award*, case No. SCH-4318 of 15 June 1994, available online at <http://cisgw3.law.pace.edu/cases/940615a4.html>]

²⁶⁹ See for example Magnus 'General Principles', part 5. b) (25); Koneru 'The International Interpretation', part II. B.

²⁷⁰ See CLOUT case No. 217 [Switzerland: *Handelsgericht* [Commercial Court] Aargau 26 September 1997, available online at <http://cisgw3.law.pace.edu/cases/970926s1.html>]; CLOUT case No. 80 [Germany: *Kammergericht* [Appellate Court] Berlin 24 January 1994, available online at <http://cisgw3.law.pace.edu/cases/940124g1.html>]; CLOUT case No. 56 [Switzerland: *Pretore della giurisdizione* [District Court] Locarno Campagna 27 April 1992, available online at <http://cisgw3.law.pace.edu/cases/920427s1.html>]

²⁷¹ This view was for example expressed in Bulgaria: *Arbitration Award* case No. 11/1996 of 12 February 1998, available online at <http://cisgw3.law.pace.edu/cases/980212bu.html>; Germany: *Landgericht* [District Court] Zwickau 19 March 1999, available online at <http://cisgw3.law.pace.edu/cases/990319g1.html>

On the one hand, this concept gets obvious out of art 84 (1) CISG dealing with the payment of interest on the price to be refunded by the seller. Interest is to be paid starting from the date on which the price was paid. A formal notice to the seller isn't necessary.

On the other hand, this view complies with the idea of full compensation, on which – as we have just seen – the CISG is based. Concerning the issue in dispute, the application of this idea means that the debtor in failure to pay must bear the creditor's loss from the date, the payment was due.²⁷² Due payment would have meant interest on the sum from this day on. Consequently, the creditor's loss of interest must be borne by the debtor.

- (3) Finally, the most controversially discussed issue concerning the payment of interest is how to determine the rate of interest payable. Both art 78 and 84 CISG don't provide any express regulation in this respect.

Hence, the starting point of all discussions must be to determine, whether the issue of the rate of interest constitutes a gap *praeter legem*, to be solved in accordance with art 7 (2) CISG or a gap *intra legem*, to be resolved by having recourse to the applicable national law.²⁷³ The question whether or not the rate of interest is a matter governed by the CISG, is decisive therefore.

The legislative history of the rule eventually adopted in art 78 CISG could be helpful to find an answer to this problem. It shows that the delegates were unable to agree on a specific rate to be incorporated in the Convention and finally agreed on a compromise, set out in art 78 CISG.²⁷⁴

²⁷² See for the same opinion Koneru 'The International Interpretation', part II. B.

²⁷³ See for this problem of categorisation Chapter V. 1. on p. 20 of this dissertation

²⁷⁴ See for example Schlechtriem *Commentary* (2005), art 78, para 2; Koneru 'The International Interpretation', part II. A.

There are some who believe that, due to the fact that the Conference deliberately omitted a rule on the rate of interest, the issue is not governed by the Convention requiring the gap *intra legem* to be filled with the applicable national law.²⁷⁵

However, there is another group classifying the gap as a gap *praeter legem* and therefore allowing the recourse to general principle in terms of art 7 (2) CISG.²⁷⁶ Such an approach for the solution of the problem of determining the rate of interest is of course desirable under the aspect of the uniformity of the application of the Convention. Mainly, they believe that the payment of interest is a matter governed by the CISG. Only the method how the rate of interest is to be fixed is not expressly mentioned.²⁷⁷ Another argument is that the wording of art 78 CISG nowhere expressly orders that the interest rate is an issue to be resolved by the applicable domestic law.²⁷⁸

I believe that – bearing in mind the ultimate goal of uniformity – it is wise to follow the second opinion. The fact that the delegates couldn't agree on a method to determine the applicable rate doesn't necessarily mean that they wanted this issue to be governed by domestic law. The arguments supporting a uniform approach prevail over those supporting the other view.

But, even the supporters of a uniform approach do not agree on how the interest rate should be determined.

The following passage shall only give a brief overview of the existing proposals.

Some believe that the rate of interest shall be determined in accordance with the loss suffered by the creditor because of the debtor's failure to

²⁷⁵ See references to scholars as well as case law in Schlechtriem *Commentary* (2005), art 78, para 27, footnote 25

²⁷⁶ See Koneru 'The International Interpretation', part II. A.; Mather 'Choice of Law', p. 155

²⁷⁷ See Koneru 'The International Interpretation', part II. A.

²⁷⁸ See Schlechtriem *Commentary* (2005), art 78, para 28

pay.²⁷⁹ Others see the compensation for benefits obtained by the debtor to be the purpose of art 78 CISG. Consequently, they want the usual rate of interest at the debtor's place of business to be applicable.²⁸⁰ Other proposals suggested the application of the usual rate of interest at the place of performance or an international one, such as for example LIBOR.²⁸¹ Finally, some scholars as well as courts decided to apply the Unidroit Principles (art 7.4.9) or the Principles of European Contract Law (art 4.507(1), art 9.508 (1)).²⁸²

Bacher correctly points out that – regardless of the exact purpose of art 78 CISG – it is wrong to allow local circumstances²⁸³ to influence the rate of interest, because both the debtor as well as the creditor are usually not bound to place money or take loans at their place of business.²⁸⁴ As a consequence, the prime rate of the currency involved seems to be appropriate.²⁸⁵

I support this view, leading to eg the application of the prime rate of the US Federal Reserve, in case payment is to be made in US dollars. Being completely detached from local circumstances, this approach is in line with the world wide globalization.

Recapitulating, it is a long way to go before a common understanding of how to determine the rate of interest for the purpose of art 78 CISG will be achieved. It is however important for the promotion of the goal of uniformity to solve the dispute on the basis of uniform law.

²⁷⁹ See Schlechtriem *Commentary* (2005), art 78, para 29

²⁸⁰ See supra note 279

²⁸¹ See supra note 279

²⁸² See Schlechtriem *Commentary* (2005), art 78, para 31a

²⁸³ for example by taking the creditor's or the debtor's place of business as a criterion to determine the rate of interest

²⁸⁴ See Schlechtriem *Commentary* (2005), art 78, para 30

²⁸⁵ See supra note 284

h) Principle of mitigation

Being closely connected to the principle of full compensation, the art 77, 85 and 86 CISG are to be seen as the source for the principle of mitigation or – in other words – the duty to avoid damages.²⁸⁶

This principle is also sometimes seen to be an expression of the principle of good faith in international trade.²⁸⁷

Art 77 CISG establishes the general rule that a party relying on a breach of contract must take all reasonable measures in order to keep the damages resulting from the breach to a minimum.²⁸⁸ This means that a party will not be compensated for any avoidable loss, including the loss of profit.

Additionally, the art 85 and 86 CISG contemplate specific situations in which this general rule is to be applied:

Art 85 CISG establishes the duty of the seller to take all reasonable steps to preserve the goods until they have been handed over to the buyer, even if the latter is late in taking delivery.

Art 86 CISG creates a similar duty of the buyer to preserve the goods he has received but which he does intend to reject.

These thoughts allow the conclusion that the CISG is based on the general principle of mitigation or the duty to avoid damages to be applied to situations not expressly referred to in the Convention.

An example therefore is that the seller is not only obligated to preserve the goods, as contemplated in art 85 CISG, but also to preserve material furnished by the buyer.²⁸⁹

²⁸⁶ See for example Felemegas 'Article 7 and Uniform Interpretation', p. 288; Magnus 'General Principles', part 5. b) (10); Honnold 'Uniform Law for International Sales', p. 107

²⁸⁷ See for example Schlechtriem *Commentary* (2005), art 77, para 1

²⁸⁸ See Felemegas 'Article 7 and Uniform Interpretation', p. 288; Magnus 'General Principles', part 5. b) (10); Honnold 'Uniform Law for International Sales', p. 107; Schlechtriem *Commentary* (2005), art 77, para 1

²⁸⁹ See Magnus 'General Principles', part 5. b) (10)

The principle of mitigation has also been recognised by courts of different jurisdictions.²⁹⁰ A German District Court²⁹¹ for example held that creditor's expenses for a debt collecting agency were not to be compensated by the debtor. It argued that these expenses were unnecessary because the agency had no more possibilities to achieve payment than the creditor himself. Accordingly, the compensation of these expenses was – correctly – held to be contrary to the general duty to avoid damages.

i) Principle of concurrent performance

The next principle is concerned with the order in which the parties to a contract have to perform their contractual obligations. Indications for the existence of a general rule regarding this issue are to be found in the following provisions of the Convention:

First of all, art 58 (1) CISG stipulates the rule that the parties to the contract generally have to perform their obligations concurrently. Exemptions there from have to be made in case of agreements to the contrary (see art 6 CISG).

Moreover, art 58 (3) CISG orders the buyer to be obligated to pay the purchase price only after having had the possibility to examine the delivered goods.

Additionally, art 81 (2) 2nd sentence CISG also stipulates concurrent performance in case the contract has been declared avoided.

This evidence within the Convention allows the conclusion that the CISG is based on the general principle that none of the parties have to perform first (also called principle of *do ut des*), which has to be applied to any contractual

²⁹⁰ See for example Germany: *Landgericht* [District Court] Zwickau 19 March 1999, available online at <http://cisgw3.law.pace.edu/cases/990319g1.html>; ICC *Court of Arbitration* case No. 8817 of December 1997, available online at <http://cisgw3.law.pace.edu/cases/978817i1.html>; Italy: *Tribunale* [District Court] Rimini 26 November 2002, available online at <http://cisgw3.law.pace.edu/cases/021126i3.html>

²⁹¹ See Germany: *Landgericht* [District Court] Zwickau 19 March 1999, available online at <http://cisgw3.law.pace.edu/cases/990319g1.html>

obligation.²⁹² Thus, this principle also applies to services additionally to the ones contained in the CISG, to which the parties have agreed.

j) Right of retention

Closely connected to the principle of concurrent performance, mentioned above, another important question occurs when it comes to the question whether a party is generally entitled to withhold its performance until the other party has performed in accordance with the contractual terms.

It is disputed whether the provisions of the CISG allow the conclusion that the Convention embodies such a general rule.

The following provisions regulate a right to withhold performance only in specific instances:

To start with, art 58 CISG gives the buyer the right to withhold the payment of the purchase price as long as the seller hasn't delivered the goods in accordance with the contract terms and the Convention itself.

Furthermore, art 71 CISG contemplates a right of retention in relation to the non-performance of a substantial part of (any of) a party's obligations. Although the scope of art 71 CISG is broader, it only applies in relation to anticipatory breaches and not to non-performance or malperformance of obligations already due.²⁹³

Also art 81 (2) 2nd sentence provides for a concurrent restitution after avoidance of the contract.

Finally, the CISG contains some special rights to retain in art 85 2nd sentence CISG (seller's right to withhold the goods until he is reimbursed for his expenses in order to preserve them) and art 86 (1) CISG (similar right for the buyer in case he wants to reject the goods).

²⁹² See for example Magnus 'General Principles', part 5. b) (13)

²⁹³ See Schlechtriem *Commentary* (2005), art 7, para 34

The majority of writers argue in favour of a general right to withhold to be derived from the provisions mentioned above in respect to obligations and claims based on a contract, which is governed by the CISG.²⁹⁴ This means that such a right exists not only in relation to obligations regulated in the Convention, but also in connection with obligations autonomously created by the parties on the basis of art 6 CISG.²⁹⁵

However, it remains the question whether this general right constitutes a defence to be raised in court or an objection to be considered ex officio by the court.²⁹⁶ Although this problem shall not be discussed in this dissertation, it can be said that according to Schlechtriem, the right of retention should be treated as a defence with retroactive effect.²⁹⁷

k) Principle to determine place of payment of all monetary obligations

After having examined general principles in respect to the performance of obligations in general, it is necessary to have a closer look at the monetary obligations arising in connection with a contract governed by the CISG. In this regard it is disputed whether the Convention embodies a general rule to determine the place of payment of these obligations.

Starting point is art 57 (1) (a) CISG and its regulation concerning the place of payment in relation to the buyer's obligation to pay the price. According to this paragraph the buyer has to pay the price at the seller's place of business in absence of any agreements to the contrary or in case of doubts.

The CISG doesn't regulate the place of performance for other payment obligations like for example restitution obligations and payment of damages.

This gap has to be filled in accordance with art 7 (2) CISG.²⁹⁸

²⁹⁴ See Schlechtriem *Commentary* (2005), art 7, para 34 with references to other scholars in footnote 78; but see Magnus 'General Principles', part 5. b) (15)

²⁹⁵ See Schlechtriem 'Interpretation, gap-filling', part II. 5. b) aa)

²⁹⁶ See Schlechtriem *Commentary* (2005), art 7, para 34; Schlechtriem 'Interpretation, gap-filling', part II. 5. b) bb)

²⁹⁷ See supra note 296

²⁹⁸ See for example Schlechtriem *Commentary* (2005), art 57, para 25

It is controversially discussed whether from the rule embodied in art 57 (1) (a) CISG, it can generally be inferred that in case of doubts the place of performance of all other payment obligations is the creditor's place of business.

There is much case law and comments of legal scholars available on this issue.

One court decision denied the possibility to extract a general principle from art 57 (1) (a) CISG and instead referred to the applicable national law in order to determine the place of performance of the obligation to refund the sales price.²⁹⁹

Some legal scholars supporting this view argue that the rule enshrined in art 57 (1) (a) CISG is no pillar of the Convention and is consequently not to be seen as a general principle in terms of 7 (2) CISG.³⁰⁰

However, according to the predominant view in the jurisprudence as well as amongst commentators, including myself, art 57 CISG is seen to be an expression of a general principle to be applied on a wider scale.

One court for example had to decide the place of payment of compensation due for non-conformity of the goods.³⁰¹ It thereby decided that if – in accordance with art 57 CISG – the place of performance of the purchase price is the seller's place of business, 'this indicates a general principle valid for other monetary claims as well'.

Another court had to decide at which place the seller had to reconstitute an excess in the price he had received from the buyer.³⁰² The court held that the usual interpretation of art 57 (1) CISG allows the conclusion that payment has to be fulfilled at the creditor's place of business.

²⁹⁹ See CLOUT case No. 312 [France: *Cour d'appel* [Court] Paris 14 January 1998, available online at <http://cisgw3.law.pace.edu/cases/980114f1.html>]

³⁰⁰ See Brandner 'Admissibility of Analogy', part II. A. 2.; Ferrari 'Gap-filling', p. 84

³⁰¹ See CLOUT case No. 49 [Germany: *Oberlandesgericht* [Appellate Court] Düsseldorf 2 July 1993, available online at <http://cisgw3.law.pace.edu/cases/930702g1.html>]

³⁰² See France: *Cour d'appel* [Appellate Court] Grenoble, 23 October 1996, available online at <http://cisgw3.law.pace.edu/cases/961023f1.html>

Finally, there is another decision – amongst others- suggesting the acceptance of a general principle of this kind.³⁰³ The Austrian Supreme Court had to decide the place of performance of restitution obligations in case of contract avoidance. They argued that by declaring the contract avoided it is not annulled but rather ‘changed into a winding-up relationship’. Consequently, ‘the place of performance for the obligations concerning restitution should mirror the place of performance for the primary contractual obligations’. Applying this approach, it follows that if the buyer’s obligation to pay the purchase price was to perform at the seller’s place of business, the seller’s obligation to restitute this payment is to perform at the buyer’s place of business.

Amongst those supporting the existence of a general principle based on art 57 (1) (a) CISG, the place for payment of damages is controversially discussed.³⁰⁴

A German court held that the place for performance of the obligation which has been breached is decisive for determining the place for performance of a damages claim.³⁰⁵

Due to practical problems posed by applying this view³⁰⁶, I support the view that in accordance with the principle embodied in art 57 CISG, the place of performance of damages claims is at the creditor’s place of business.³⁰⁷

l) Dispatch principle

Furthermore, it is questionable whether the CISG is based on the general principle according to which any kind of communication becomes effective on dispatch, unless the CISG therefore expressly demands receipt.

Art 27 CISG contains the rule that if a communication was made or given by an appropriate means of communication, the recipient generally bears the risk of

³⁰³ See Austria: *Oberster Gerichtshof* [Supreme Court] 29 June 1999, available online at <http://cisgw3.law.pace.edu/cases/990629a3.html>

³⁰⁴ See Schlechtriem *Commentary* (2005), art 57, para 25 for a summary of the dispute

³⁰⁵ See Germany: *Landgericht* [District Court] Aachen 14 May 1994, available online at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930514g1.html>

³⁰⁶ See Schlechtriem *Commentary* (2005), art 57, para 25, explaining these practical problems

³⁰⁷ Same opinion shared for example by Magnus ‘General Principles’, part 5. b) (24); Schlechtriem *Commentary* (2005), art 57, para 25

delay, loss or alteration during its transmission, unless the Convention expressly provides otherwise.

According to its wording, this rule directly applies to part III of the Convention only and therefore not to part II and the formation of the contract.

It is however widely accepted that the dispatch rule constitutes a general principle in terms of art 7 (2) CISG³⁰⁸ and therefore also applies with respect to communications in accordance with part II of the CISG as well as to any other communications the parties may have provided for in their contract, as long as the parties haven't agreed otherwise or the Convention states to the contrary. According to that, this general principle is for example not applicable to an offer or an acceptance because of art 15 and 18 (2) CISG, demanding the receipt of such communications.

Only a minority of legal scholars oppose this view. They decline the allegation that art 27 CISG contemplates a pillar of the Convention because it only deals with one particular issue.³⁰⁹

The prevailing view amongst the scholars is also supported by several court decisions.³¹⁰

m) Theory of receipt

In contrast to the dispatch principle, the CISG rules that some communications need to reach the recipient in order to become effective.³¹¹ This leads to the question how to determine under which circumstances a communication is to be seen as having reached the other party. Does the CISG contain a general principle to be applied in order to answer this question for all kind of

³⁰⁸ See for example Magnus 'General Principles', part 5. b) (19); Schlechtriem *Commentary* (2005), art 7, para. 30; Ferrari 'Gap-filling', p. 86

³⁰⁹ See Brandner 'Admissibility of Analogy', part II. A. 2.

³¹⁰ See Germany: *Landgericht* [District Court] Stuttgart 13 August 1991, available online at <http://cisgw3.law.pace.edu/cases/910813g1.html>; CLOUT case No. 305 [Austria: *Oberster Gerichtshof* [Supreme Court] 30 June 1998, available online at <http://cisgw3.law.pace.edu/cases/980630a3.html>]; Italy: *Tribunale* [District Court] Rimini, November 26, 2002, available on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=823&step=FullText>

³¹¹ See for example art 15 (1) CISG with respect to the offer and art 18 (2) CISG in relation to the acceptance

communication arising in connection with a sales contract, which is governed by the Convention?

Art 24 CISG contains a definition for the determination when a particular communication is to be seen as having reached the other party. Because of its wording³¹², this definition directly applies only to communications embodied in part II of the CISG, concerned with the formation of the sales contract. What about the communications embodied in part III of the CISG which, in variation of art 27 CISG, expressly require to be received by the other party?³¹³

Almost everybody agrees on the fact that due to the general relevance of the definition enshrined in art 24 CISG, it shall not be restricted to communications contemplated in part II of the CISG.³¹⁴ The rather theoretical question, whether the broad application of art 24 CISG results from extracting a general principle in terms of art 7 (2) CISG or from an analogous application seems to be solved inconsistently by the commentators.³¹⁵ While some seem to favour the extensive application of art 24 CISG by analogy³¹⁶, others believe this provision to be an expression of a general principle, on which the CISG is based.³¹⁷ Additionally, there are some commentators, who seem to be inconsistent in their categorization.³¹⁸

Bearing in mind the distinction between both legal techniques as discussed in Chapter V. of this dissertation, I believe that speaking of an analogical application rather than of a general principle is in this case more suitable. It is merely one rule, embodied in art 24 CISG which is applied to other provisions of the Convention.

³¹² Art 24 CISG reads as follows: 'For the purpose of this Part of the Convention [...]

³¹³ See for example art 47 (2), 48 (4), 63 (2), 65 (1) and (2), 79 (4) CISG

³¹⁴ See for example Schlechtriem *Commentary* (2005), art 24, para 2; Magnus 'General Principles', part 5. b) (20); Honnold 'Uniform Law for International Sales', p. 201

³¹⁵ For a distinction of both legal techniques see Chapter V. 3. on p. 24 of this dissertation

³¹⁶ See Honnold 'Uniform Law for International Sales', p. 201

³¹⁷ See Schlechtriem *Commentary* (2005), art 24, para 2

³¹⁸ See for example Magnus 'General Principles', part 5. b) (20), using the terminology 'analogy' with respect to the theory of receipt within a list of general principles on which the Convention is based

However, it has been mentioned that the importance of a clear distinction is rather of a theoretical nature.

n) Passing of risk

Art 67 (2) and 69 (3) CISG embody the rule that the risk doesn't pass to the buyer as long as the goods aren't clearly identified to the particular contract of sale.

Some legal scholars – correctly – argue that this rule expresses a general principle in terms of art 7 (2) CISG, stating that the risk doesn't pass to the buyer unless the goods are clearly identifiable to the specific contract.³¹⁹

Contrary to the above mentioned provisions, art 68 CISG, dealing with the sale of goods in transit, doesn't contain such a restriction as to the passing of risk. According to its wording, the risk generally passes to the buyer 'from the time of the conclusion of the contract'.

Under specific circumstances, to be discussed in the following part, the general principle derived from art 67 (2) and 69 (3) CISG also applies with respect to art 68 CISG. Although the latter provision deals with the sale of specific goods, it is possible that the seller may well sell an undivided amount of goods to more than one buyer (i.e. a collective consignment).³²⁰ If the specific contract of sale doesn't allow the seller to deliver a collective consignment, the passing of risk as set out in art 68 CISG is not appropriate. Rather, the general principle underlying art 67 (2) and 69 (3) CISG should be applicable in order to determine the point of time, when the risk passes to the buyer.³²¹

³¹⁹ See for example Magnus 'General Principles', part 5. b) (16); Schlechtriem *Commentary* (2005), art 68, para 6

³²⁰ See Schlechtriem *Commentary* (2005), art 68, para 6

³²¹ See 320

o) Encumbrances and benefits

Furthermore, the CISG lacks of a general rule, which determines from what point of time the buyer obtains the right to draw benefits from the goods and has the duty to bear their encumbrances.

One effect of the contract avoidance is that – according to art 84 (2) CISG – the buyer can be obliged to account to the seller for all the benefits he has derived from the particular goods. From the notion of ‘benefits’ in this article it can be inferred that the buyer has to account for the net-benefits only,³²² so that encumbrances diminish the sum to be handed over to the seller.

Consequently, art 84 (2) CISG shows that the issue of benefits and encumbrances is a matter governed by the Convention. However, a regulation concerning the date from which the buyer is entitled to benefits and must bear the encumbrances is missing.

It seems fair-minded to me to utilize the general rule for the passing of risk (see above fig. n)) in order to determine this point of time in the absence of any other agreement between the parties.³²³

p) Computation of periods of time

Art 20 (2) CISG gives rise for the assumption of another general principle on which the Convention is based.

According to art 20 (2) 1st sentence, ‘official holidays or non-business days occurring during the period for acceptance are included in calculating the period’. The 2nd sentence expresses that if the notice of acceptance can’t be delivered on the last day of the period due to for example an official holiday, the period will be extended until the next business day.

It is controversially discussed whether art 20 (2) CISG is the expression of a general principle to be applied on a wider scale.

³²² See Schlechtriem *UN-Kaufrecht*, para 48

³²³ This view is shared by Magnus ‘General Principles’, part 5. b) (17)

Some scholars argue against the existence of such a general principle. They deny the conclusion that the Convention is based on the rule embodied in art 20 (2) CISG because this provision is much too detailed and moreover only related to time limits that it could be said that the Convention is based on it.³²⁴

I believe – together with some important scholars³²⁵ – that art 20 (2) can be seen as the source for another general principle in terms of 7 (2) CISG, to be applied to other periods as well like for example periods concerning delivery and payment.

As a consequence, official holidays or non-business days generally do not extend a particular period of time, unless the last day of this period falls on such a day.

q) Principle of forfeiture

Further, it is questionable whether the concept of forfeiture is also a thought contained in the CISG and can therefore be used in terms of art 7 (2) CISG. Although it is not possible to determine a prevailing view on this point, the concept of forfeiture should be seen as constituting a general principle in terms of art 7 (2) CISG.

In fact, the concept of forfeiture is to be seen as an issue closely linked to the principle of good faith.³²⁶

It barely means that a party can lose a right by not asserting it for a longer period of time and thus creating the impression for the other party that the first party will not assert these rights at all.³²⁷

According to Magnus, the existence of such a principle within the CISG can be derived from those provisions generally establishing the principle of reliance protection like art 16(2) (b), 29 (2) 2nd sentence, 35 (2) (b) and art 42 (2) (b) CISG.

³²⁴ See Brandner 'Admissibility of Analogy', part II. A. 2.

³²⁵ See for example Magnus 'General Principles', part 5. b) (18); Schlechtriem *Commentary* (2005), art 7, para 30

³²⁶ See Magnus 'General Principles', part 5. b) (6); Schlechtriem *Kommentar* (2000), art 7, para 51; Schlechtriem *UN-Kaufrecht*, para 48

³²⁷ See Magnus 'General Principles', part 5. b) (6); Schlechtriem *UN-Kaufrecht*, para 48

He further believes that one example for the application of this principle of forfeiture is art 46 (1) CISG, which doesn't contain any references to a time limit for the buyer's right to claim delivery by the seller. In his opinion, the buyer forfeits his right to performance if he lets the contract rest for a longer time period such as one year or longer.³²⁸ This view is correct.

r) Principle concerning issue of burden of proof

Finally, I would now like to discuss an issue of the CISG, completely different to the ones mentioned before, but of great importance for the process of enforcing a particular right enshrined in the Convention. Namely, the issue of burden of proof, which is again an aspect controversially discussed in the light of art 7 (2) CISG.

The main question to be answered is whether or not the issue of burden of proof is governed by the CISG and therefore allows the application of art 7 (2) CISG.

Legal scholars disagree on this decisive categorisation.

First of all, it has to be mentioned that a big group of draftsmen of the Convention disapproved to include a provision dealing with the issue of burden of proof in the Convention. They feared to regulate procedural matters together with this issue, for which the Conference had no mandate.³²⁹

One group supports the view that this issue is not governed by the CISG and consequently refers to the domestic law in order to determine the principles to be applied regarding the burden of proof.³³⁰ Within this group there are diverging views as to how the applicable domestic law should be identified.³³¹

³²⁸ See Magnus 'General Principles', part 5. b) (6)

³²⁹ See Schlechtriem *UN-Kaufrecht*, para 50

³³⁰ See Ferrari 'Burden of Proof', part II with references; Please be aware of the fact that Ferrari seems to have mixed up the meaning of the term 'gap praeter legem' and gap 'intra legem' in this article. In another article (see Franco Ferrari 'Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing', available online at <http://cisgw3.law.pace.edu/cisg/wais/db/editorial/ferrari940615a3.html>) he correctly refers to their meaning as was mentioned above in Chapter V. 1. on p. 20 of this dissertation

³³¹ See Ferrari 'Burden of Proof', part II

The vast majority of legal scholars however argue in favour of the burden of proof to be a matter governed by the CISG but not expressly in it.³³² Their main argument for this conclusion is that the CISG itself implicitly provides at least one rule on the burden of proof in art 79 (1) CISG.³³³ Furthermore, they believe that the principles concerning the issue of burden of proof must be extracted from the CISG itself due to the close connection of the issue of burden of proof with the substantive law.³³⁴ In other words, it can be said that additionally to art 79 CISG, several other provisions of the CISG allow, due to their wording, a conclusion as to the distribution of the burden of proof.³³⁵ The term ‘unless’ for example indicates the burden of proof to be lying with the party alleging this specific exemption.³³⁶ Finally, some provisions also presuppose a particular distribution of the burden of proof like for example art 44 CISG.³³⁷ A reasonable excuse for the failure to give the required notice, as mentioned in art 44 CISG, can only be given by the party asserting such an excuse.

This prevailing view amongst legal scholars is also supported by numerous court decisions.³³⁸

It must however be noted that there are also decisions in which the tribunals decided against the issue of burden of proof to be governed by the Convention and therefore decided according to the applicable domestic law.³³⁹

³³² See Magnus ‘General Principles’, part 5. b) (26); Schlechtriem *Commentary* (2005), art 7, para 30; Ferrari ‘Burden of Proof’, part II.

³³³ See supra note 332

³³⁴ See Ferrari ‘Burden of Proof’, part II.

³³⁵ See Magnus ‘General Principles’, part 5. b) (26)

³³⁶ See supra note 335

³³⁷ See supra note 335

³³⁸ See CLOUT case No. 378 [Italy: *Tribunale* [District Court] Vigevano 12 July 2000, available online at <http://cisgw3.law.pace.edu/cases/000712i3.html>]; CLOUT case No. 380 [Italy: *Tribunale* [District Court] Pavia 29 December 1999, available online at <http://cisgw3.law.pace.edu/cases/991229i3.html>]; CLOUT case No. 196 [Switzerland: *Handelsgericht* [Commercial Court] Zürich 26 April 1995, available online at <http://cisgw3.law.pace.edu/cases/950426s1.html>]; CLOUT case No. 97 [Switzerland: *Handelsgericht* [Commercial Court] Zürich 9 September 1993, available online at <http://cisgw3.law.pace.edu/cases/930909s1.html>]

³³⁹ See CLOUT case No. 261 [Switzerland: *Bezirksgericht* [District Court] Sanne 20 February 1997, available online at <http://cisgw3.law.pace.edu/cases/970220s1.html>]; CLOUT case No. 103 [ICC *Court of Arbitration*, case No. 6653 of 26 March 1993, available online at <http://cisgw3.law.pace.edu/cases/956653i1.html>]; in one case, a state court referred to the problem of whether the Convention is based upon a particular general principle in respect of the issue of burden of

Both legal scholars³⁴⁰ as well as courts³⁴¹, arguing in favour of the application of art 7 (2) CISG, have developed three general principles concerning the issue of burden of proof:

- (1) Any party has to prove the existence of the factual prerequisites of a particular provision from which it wants to derive beneficial legal consequences;
- (2) Any party asserting an exception in its favour has to prove the existence of the factual prerequisites of that exception; and
- (3) Those facts lying exclusively in a party's sphere of responsibility and which therefore are, at least theoretically, better known to that party have to be proven by the party exercising the control over that sphere.

Due to the fact that severe differences exist between the chosen approaches to be found in different domestic laws all over the world, it is from my perspective very important to agree on the particular gap to be filled in accordance with art 7 (2) CISG and the principles just mentioned before. This would also mean legal certainty on a very important aspect of the Convention.

4. Rules not to be interpreted as general principles

After having given a brief overview of the state of discussion in relation to those general principles which can be derived from the provisions of the CISG, I will now name some rules which – from my perspective – do not constitute general principles in terms of art 7 (2) CISG.

proof or whether the issue is one not governed by the Convention, but left the issue open; see therefor CLOUT case No. 253 [Switzerland: *Tribunale d'appello* [Appellate Court] Lugano 15 January 1998, available online at <http://cisgw3.law.pace.edu/cases/980115s1.html>]

³⁴⁰ See Magnus 'General Principles', part 5. b) (26)

³⁴¹ See especially CLOUT case No. 378 [Italy: *Tribunale* [District Court] Vigevano 12 July 2000, available online at <http://cisgw3.law.pace.edu/cases/000712i3.html>]

a) Currency of payment

The following passage will focus on the question whether the CISG is based on the general principle stating that, in absence of a parties' agreement to the contrary, the seller's place of business governs all questions relating to payment and therefore also governs the question of currency.

It is controversially discussed whether the issue of currency of payment constitutes a gap within the scope of the Convention.

The legal history shows that the delegates of the Vienna Convention voted against a Spanish proposal to include a provision fixing a specific method to determine the currency of payment.³⁴²

According to the definition of a gap as an unintentional incompleteness³⁴³, this could mean that no such gap could be assumed and recourse to domestic law would be necessary. However, the definition of a gap must be seen as a basic rule with exceptions. The fact that the delegates didn't agree on a specific issue doesn't always mean that they wanted this issue not to be governed by the Convention. It can sometimes barely result from the failure to reach a compromise agreement.

In fact, the issue of currency of the payment is such an important aspect for the whole transaction that it is hardly imaginable that this issue shall not be governed by the Convention.³⁴⁴ Accordingly, an internal gap of the Convention is to be assumed. This view was also expressed in a ruling of a German District Court.³⁴⁵

The decisive question is now how to fill this gap.

First of all, art 6 CISG and the overriding principle of party autonomy must be considered. A parties' agreement with respect to the currency is of course binding.

³⁴² See Koneru 'The International Interpretation', part II. C.

³⁴³ See above Chapter V. 1. on p. 20

³⁴⁴ This opinion is for example shared in Schlechtriem *Commentary* (2005), art 54, para 9 with several references to author scholars

³⁴⁵ See Germany: *Landgericht* [District Court] Berlin 24 March 1998, available online at <http://cisgw3.law.pace.edu/cases/980324g1.html>

In the absence of such an agreement, art 9 CISG has to be taken into consideration.³⁴⁶ Are there usages or practices between the parties, indicating the currency in which the payment has to be done? According to Koneru, ‘the general rule based on trade usage seems to be that the currency will be that of the place of payment’.³⁴⁷ Due to art 57 (1) (a) CISG, this would be the seller's place of business unless the parties agree to the contrary.

It is however questionable, whether such a general trade usage exists in international trade.

If gap-filling in accordance with art 9 CISG is also unsuccessful, it is questionable whether another general principle can be derived from the Convention.

For instance, it is believed that the Convention shows preference for the creditor in art 57 and 54 CISG. As a consequence, all payment claims shall be done in the currency at the seller’s place of business.³⁴⁸

Contrary to that, other commentators share the view that domestic law must be applied.³⁴⁹

The existing case law is not very helpful on this particular issue. The above mentioned German District Court did – unfortunately – not decide between these two approaches.³⁵⁰

From my perspective, the view according to which domestic law is to be applied is correct. The fact that the payment has to be done at the seller’s place of business (art 57 (1) (a) CISG) can only be seen as an indication for the currency but not more.

³⁴⁶ See Schlechtriem *Commentary* (2005), art 54, para 9

³⁴⁷ See Koneru ‘The International Interpretation’, part II. C.

³⁴⁸ See Magnus ‘General Principles’, part 5. b) (23)

³⁴⁹ See Schlechtriem *Commentary* (1998), art 7, para 39; Schlechtriem *Commentary* (2005), art 54, para 9; Ferrari ‘Gap-filling’, p. 84

³⁵⁰ See *supra* note 345

b) Issue of set-off

There are also diverging views with respect to the issue of set-off.

Again, it is questionable whether this is an issue governed, albeit not expressly settled, in the Convention.

Although there is case law, which argues in favour of a gap *praeter legem* and the existence of a general principle in terms of 7 (2) CISG, permitting reciprocal claims arising under the Convention to be offset,³⁵¹ the majority of the courts disagree with this view. From their perspective, the issue of set-off is a matter not governed by the Convention at all.³⁵²

³⁵¹ See CLOUT case No. 348 [Germany: *Oberlandesgericht* [Appellate Court] Hamburg 26 November 1999, available online at <http://cisgw3.law.pace.edu/cases/991126g1.html>]

³⁵² See for example Austria: *Oberster Gerichtshof* [Supreme Court] 22 October 2001, available online at <http://cisgw3.law.pace.edu/cases/011022a4.html>; CLOUT case No. 378 [Italy: *Tribunale* [District Court] Vigevano 12 July 2000, available online at <http://cisgw3.law.pace.edu/cases/000712i3.html>]; Germany: *Amtsgericht* [Lower Court] Duisburg 13 April 2000, available online at <http://cisgw3.law.pace.edu/cases/000413g1.html>; CLOUT case No. 232 [Germany: *Oberlandesgericht* [Appellate Court] München 11 March 1998, available online at <http://cisgw3.law.pace.edu/cases/980311g1.html>]; CLOUT case No. 259 [Switzerland: *Kantonsgericht* [Canton Court] Freiburg 23 January 1998, available online at <http://cisgw3.law.pace.edu/cases/980123s1.html>]; Germany: *Landgericht* [District Court] Hagen 15 October 1997, available online at <http://cisgw3.law.pace.edu/cases/971015g1.html>; Germany: *Landgericht* [District Court] München 6 May 1997, available online at <http://cisgw3.law.pace.edu/cases/970506g1.html>; CLOUT case No. 275 [Germany: *Oberlandesgericht* [Appellate Court] Düsseldorf 24 April 1997, available online at <http://cisgw3.law.pace.edu/cases/970424g1.html>]; CLOUT case No. 169 [Germany: *Oberlandesgericht* [Appellate Court] Düsseldorf 11 July 1996, available online at <http://cisgw3.law.pace.edu/cases/960711g1.html>]; Germany: *Landgericht* [District Court] Duisburg 17 April 1996, available online at <http://cisgw3.law.pace.edu/cases/960417g1.html>; CLOUT case No. 289 [Germany: *Oberlandesgericht* [Appellate Court] Stuttgart 21 August 1995, available online at <http://cisgw3.law.pace.edu/cases/950821g1.html>]; Germany: *Landgericht* [District Court] München 20 March 1995, available online at <http://cisgw3.law.pace.edu/cases/950320g1.html>; Netherlands: *Rechtbank* [District Court] Middelburg 25 January 1995, available online at <http://cisgw3.law.pace.edu/cases/950125n1.html>; Germany: *Amtsgericht* [Lower Court] Mayen 6 September 1994, available online at <http://cisgw3.law.pace.edu/cases/940906g1.html>; CLOUT case No. 281 [Germany: *Oberlandesgericht* [Appellate Court] Koblenz 17 September 1993; available at <http://cisgw3.law.pace.edu/cases/930917g1.html>]; CLOUT case No. 125 [Germany: *Oberlandesgericht* [Appellate Court] Hamm 9 June 1995; available at <http://cisgw3.law.pace.edu/cases/950609g1.html>]; Netherlands: *Rechtbank* [District Court] Roermond 6 May 1993; available at <http://cisgw3.law.pace.edu/cases/930506n1.html>; CLOUT case No. 99 [Netherlands *Rechtbank* [District Court] Arnhem 25 February 1993, available online at <http://cisgw3.law.pace.edu/cases/930225n1.html>]

Some legal scholars like Magnus for example believe that a set-off should be granted directly by virtue of the Convention when both claims result from the contractual relationship governed by the latter.³⁵³

Others follow the view expressed by the majority of courts and deny this issue to be governed by the CISG.³⁵⁴

I believe that the latter view should be favoured due to the fact that the CISG itself gives no real argument supporting the contrary assumption.

c) Seniority of payment claims

Finally, the seniority of payment claims is also an issue to be investigated in terms of art 7 (2) CISG.

Case law on ULIS is available, stating that the latter is based on the principle that in case of doubt, a payment should first be applied to default interest and in a second step against the oldest debt.³⁵⁵

The existence of such a general principle was already questionable in relation to the ULIS due to the absence of any indication therefor in its provisions.³⁵⁶

The same argumentation can be found with respect of the CISG.³⁵⁷ An examination of the provisions of the CISG offers no connecting factor for the conclusion that a general principle dealing with the seniority of payment claims exists.

Together with other commentators,³⁵⁸ I support this view. The derivation of such a principle would be contrary to the rule that a general principle in terms of art 7 (2) CISG must result from it with sufficient clarity.³⁵⁹

³⁵³ See for example Magnus 'General Principles', part 5. b) (14)

³⁵⁴ See for example Ferrari 'Gap-filling', p. 87

³⁵⁵ See Netherlands: Hof Amsterdam, November 4, 1982, Ned. IPR 1983 No. 215; Netherlands: Rb. Alkmaar May 27, 1982 and Rb. Amsterdam (NL) March 5, 1980, to be found in Schlechtriem *Internationale Rechtsprechung*, art 17 EKG, para 4, 6

³⁵⁶ See Magnus 'General Principles', part 5. c) (2)

³⁵⁷ See supra note 356

³⁵⁸ See for example Schlechtriem *Commentary* (1998), art 7, para 39

³⁵⁹ See above Chapter V. 4. b) on p. 29 of this dissertation

5. Principles to be found outside the CISG

After having given an overview of the general principles to be derived from the provisions of the CISG, the following part of this dissertation will now deal with principles which – although they are found outside the CISG – can be used to fill gaps in accordance with art 7 (2) CISG.

a) General comments

As we have already seen above, the Unidroit Principles and the Lando Principles can be used for gap-filling in terms of art 7 (2) CISG only when the particular principle can be seen as an expression of a general principle on which the CISG is based.³⁶⁰

This means that the Unidroit Principles can be used to affirm the solution of the case at hand on the basis of a general principle of the CISG due to their ‘persuasive authority’.³⁶¹

Furthermore, they can be applied in order to clarify the content of the often somehow vague and abstract general principle derived from the provisions of the CISG.³⁶²

These statements also apply in relation to the Lando Principles.³⁶³

b) Examples of the Unidroit Principles

Providing an exhaustive list of the provisions of the Unidroit Principles and Lando Principles used in accordance with art 7 (2) CISG is of limited value because of this restricted way of using both sets of rules with respect to fill gaps within the scope of the CISG. Consequently, I will limit the following

³⁶⁰ See Chapter V. 4. b) cc) on p. 32 of this dissertation

³⁶¹ See Schlechtriem *Kommentar* (2000), art 7, para 63; Ferrari ‘Das Verhältnis zwischen Unidroit und allgemeinen Grundsätzen’, p. 16

³⁶² See Schlechtriem *Kommentar* (2000), art 7, para 64; Ferrari ‘Das Verhältnis zwischen Unidroit und allgemeinen Grundsätzen’, p. 16

³⁶³ See Chapter V. 4. b) cc) on p. 32 of this dissertation in case these two sets of principles contain different statements

enumeration to a few examples of the Unidroit Principles, which are often named in this context.

aa) Good faith principle

As has been discussed above, the CISG is based on the general principle of good faith.³⁶⁴

This Principle is laid down in art 1.7 of the Unidroit Principles, too. In order to fill gaps within the Convention in terms of art 7 (2) CISG, reference is made to art 2.1.15 and 2.1.16 of the Unidroit Principles. The latter provisions, dealing with ‘negotiations in bad faith’ (art 2.1.15) and the ‘duty of confidentiality’ (art 2.1.16), are seen as expressions of the principle of good faith and are therefore an admissible gap-filling source.³⁶⁵

bb) Principle of reasonableness

Furthermore, it is referred to the art 6.1.7, 6.1.8 and 6.1.9 of the Unidroit Principles as they are seen to be expressions of the principle of reasonableness, on which the CISG is based as well.³⁶⁶ The duty of the parties to the contract to act in a reasonable manner clearly underlies all those provisions. Specifically, they regulate whether a party is entitled to pay by cheque or any similar instruments or by funds transfer and if so, under what conditions.

cc) Principle of full compensation

The principle of full compensation³⁶⁷ is also a general principle often mentioned in relation to gap-filling with the help of the Unidroit Principles.

³⁶⁴ See Chapter VI. 2. of this dissertation at p. 41

³⁶⁵ See Bonell ‘The Unidroit Principles and CISG’, part 3. (b)

³⁶⁶ See Felemegas ‘Article 7 and Uniform Interpretation’, p. 308-309; Bonell ‘The Unidroit Principles and CISG’, part 3. (b); The principle of reasonableness has been discussed in Chapter VI. 2. b) aa) on p. 44 of this dissertation

³⁶⁷ See Chapter VI. 3. g) on p. 57 of this dissertation

Reference is made to art 7.4.9 paragraph (1) and (2) and art 7.4.12 of the Unidroit Principles.³⁶⁸

Paragraph (1) of art 7.4.9 states that interest is to be paid from the time the payment is due.

Reference to paragraph (2) of art 7.4.9 – determining the rate of interest – is from my point of view inappropriate. As has been discussed earlier in this dissertation, it is correct to deny the rate of interest to be an issue governed by the CISG.³⁶⁹

Art 7.4.12 of the Unidroit Principles deals with the currency in which damages have to be assessed.

dd) Place of payment

Also art 6.1.6 (1) (a) of the Unidroit Principles is named in accordance with art 7 (2) CISG.³⁷⁰ According to this provision, all monetary obligations are to be performed at the obligee's place of business. This corresponds with the general principle of how to determine the place of payment of all monetary obligations, on which the CISG is based.³⁷¹

ee) Favor contractus principle

Finally, it is controversially discussed whether art 6.2.2 and 6.2.3 of the Unidroit Principles – dealing with issues of 'hardship' – can be used in terms of art 7 (2) CISG as the expression of the favor contractus principle³⁷² of the CISG.³⁷³ It is questionable whether the issue of hardship constitutes a true

³⁶⁸ See Felemegas 'Article 7 and Uniform Interpretation', p. 309-310; Bonell 'The Unidroit Principles and CISG', part 3. (b)

³⁶⁹ See Chapter VI. 3. g) bb) on p. 60 of this dissertation

³⁷⁰ See Bonell 'The Unidroit Principles and CISG', part 3. (b)

³⁷¹ See Chapter VI. 3. k) of this dissertation on p. 66

³⁷² See Chapter VI. 3. b) of this dissertation on p. 51

³⁷³ See supra note 370

gap in the CISG because of art 79 CISG, setting out the grounds for exemption of liability in an exhaustive manner.³⁷⁴

I believe that hardship should be of no relevance under the CISG as long as it doesn't constitute an 'impediment' in terms of art 79 (1) CISG.³⁷⁵

VII. CONCLUSION

Recapitulating, the goal of this dissertation was not merely to give an overview of the whole issue of gap-filling in the CISG. The primary goal was rather to enhance the sensibility of everybody, applying the CISG, to always bear in mind the ultimate goal of the CISG to promote uniformity in its application.

At the same time, this doesn't mean that the wording of art 7 (2) CISG can be ignored. Both the limitation to general principles on which the CISG is based as well as the possibility to resort to domestic law must be respected.

The uniform application of the Convention on the field of gap-filling can only be achieved by the development of a consistent international jurisprudence. An important precondition for realising this target, namely the availability of international jurisprudence on the CISG, was accomplished by creating the databases of Unilex and Uncitral. As a consequence, the courts shouldn't feel obliged to refer to their national law anymore only because of the inaccessibility of international case law.

Hopefully, this dissertation can contribute to this effect.

³⁷⁴ See supra note 370

³⁷⁵ The same opinion is shared in Bonell 'The Unidroit Principles and CISG' in part 3. (b)

Bibliography

1. Books and essays in edited books

C.M. Bianca/M.J. Bonell *Commentary on the International Sales Law - The 1980 Vienna Sales Convention*, Giuffrè, Milan, 1987
[cited as: Bianca/Bonell *Commentary*]

John Felemegas ‘The United Nations Convention on the International Sale of Goods: Article 7 and Uniform Interpretation’ in Pace International Law Review, *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2000 – 2001*, New York, The Hague, London, Kluwer Law International, p. 115
[cited as: Felemegas ‘Article 7 and Uniform Interpretation’]

Peter Schlechtriem *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd edition (in translation), New York, Oxford University Press, 1998
[cited as: Schlechtriem *Commentary* (1998)]

Peter Schlechtriem *Kommentar zum Einheitlichen UN-Kaufrecht – Das Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf – CISG* –, 3rd edition, Munich, Beck, 2000
[cited as: Schlechtriem *Kommentar* (2000)]

Peter Schlechtriem/Ingeborg Schwenzer *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd (English) edition, New York, Oxford University Press, 2005 [cited as: Schlechtriem *Commentary* (2005)]

Peter Schlechtriem *Internationale Rechtsprechung zu EKG und EAG, Eine Sammlung belgischer, deutscher, italienischer, israelischer und niederländischer*

Entscheidungen zu den Haager Einheitlichen Kaufgesetzen, 1st edition, Baden Baden, Nomos, 1987 (review by Posch, 54 *Rabels Zeitschrift for foreign and international Private Law* (1990), p. 182)

[cited as: Schlechtriem *Internationale Rechtsprechung*]

Peter Schlechtriem *Internationales UN-Kaufrecht*, 3rd edition, Tübingen, Mohr Siebeck, 2005 [cited as: Schlechtriem *UN-Kaufrecht*]

J. von Staudinger/Ulrich Magnus *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen - Wiener UN-Kaufrecht (CISG)*, 15th edition, Berlin, Sellier – de Gruyter, 2005 [cited as: Staudinger/Magnus *Kommentar*]

2. Periodicals

Larry A. DiMatteo and others ‘The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence’ in 34 *Northwestern Journal of International Law and Business* (2004) p. 299, available online at <http://www.cisg.law.pace.edu/cisg/biblio/dimatteo3.html>
[cited as: DiMatteo ‘The Interpretive Turn’]

Franco Ferrari ‘Uniform Interpretation of The 1980 Uniform Sales Law’ in 24 *Georgia Journal of International and Comparative Law* (1994-95) p. 183, available online at <http://www.cisg.law.pace.edu/cisg/biblio/franco.html>
[cited as: Ferrari ‘Uniform Interpretation’]

Franco Ferrari ‘Das Verhältnis zwischen den Unidroit-Grundsätzen und den allgemeinen Grundsätzen internationaler Einheitsprivatrechtskonventionen’ in 53 *Juristenzeitung* (1998) p. 9
[cited as: Ferrari ‘Das Verhältnis zwischen Unidroit und allgemeinen Grundsätzen’]

Franco Ferrari ‘Gap-Filling and Interpretation of the CISG: Overview of International Case Law’ in 7 *Vindobona Journal of International Commercial Law & Arbitration* (2003) p. 63, available online at <http://www.cisg.law.pace.edu/cisg/biblio/ferrari11.html>
[cited as: Ferrari ‘Gap-filling’]

Franco Ferrari ‘What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG’ in 25 *International Review of Law and Economics* (2005) p. 314, available online at <http://www.cisg.law.pace.edu/cisg/biblio/ferrari15.html>
[cited as: Ferrari ‘What Sources of Law’]

Martin Gebauer ‘Uniform Law, General Principles and Autonomous Interpretation’ in *Uniform Law Review* (2000-4) p. 683, available online at <http://www.cisg.law.pace.edu/cisg/biblio/gebauer.html>
[cited as: Gebauer ‘Uniform Law’]

John Honnold ‘The Sales Convention in action – uniform international words: uniform application?’ in 8 *Journal of Law and Commerce* (1988) p. 207, available online at <http://www.cisg.law.pace.edu/cisg/biblio/honnold-sales.html>
[cited as: Honnold ‘The Sales Convention’]

Phanesh Koneru ‘The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles’ in 6 *Minnesota Journal of Global Trade* (1997) p. 105, available online at <http://www.cisg.law.pace.edu/cisg/biblio/koneru.html>
[cited as: Koneru ‘The International Interpretation’]

Ulrich Magnus ‘General Principles of UN-Sales Law’ in 59 *Rabels Zeitschrift for foreign and international Private Law* (1995), Issue 3-4 (October), available online at <http://www.cisg.law.pace.edu/cisg/biblio/magnus.html>
[cited as: Magnus ‘General Principles’]

Henry Mather ‘Choice of Law for International Sales Issues Not Resolved by the CISG’ in 20 *Journal of Law and Commerce* (Spring 2001) p. 155, available online at <http://www.cisg.law.pace.edu/cisg/biblio/mather1.html>
[cited as: Mather ‘Choice of Law’]

Ernst Rabel ‘Der Entwurf eines einheitlichen Kaufgesetzes’ in 9 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1935), p. 1
[cited as: Ernst Rabel, *RabelsZ*]

Mark N. Rosenberg ‘The Vienna Convention: Uniformity in Interpretation for Gap-filling - An Analysis and Application’ in 20 *Australian Business Law Review* (1992) p. 442, available online at <http://www.cisg.law.pace.edu/cisg/biblio/rosenberg.html>
[cited as: Rosenberg ‘The Vienna Convention’]

Lucia Carvalhal Sica ‘Gap-filling in the CISG: May the Unidroit Principles supplement the gaps in the Convention?’ in *Nordic Journal of Commercial Law* (2006/1), available online at http://www.njcl.utu.fi/1_2006/article2.pdf
[cited as: Sica ‘Gap-filling in the CISG’]

3. Internet sources

Ralph Amissah ‘The Autonomous Contract – Reflecting the borderless electronic-commercial environment in contracting’, available online at <http://www.cisg.law.pace.edu/cisg/biblio/amissah2.html>
[cited as: Amissah ‘The Autonomous Contract’]

M. Joachim Bonell ‘The UNIDROIT Principles and CISG’, available online at <http://cisgw3.law.pace.edu/cisg/biblio/bonell.html>
[cited as: Bonell ‘The Unidroit Principles and CISG’]

Gert Brandner ‘Admissibility of Analogy in Gap-filling under the CISG’, available online at <http://www.cisg.law.pace.edu/cisg/biblio/brandner.html>
[cited as: Brandner ‘Admissibility of Analogy’]

Franco Ferrari ‘Burden of Proof under the CISG’, available online at <http://www.cisg.law.pace.edu/cisg/biblio/ferrari5.html>
[cited as: Ferrari ‘Burden of Proof’]

John Honnold ‘Uniform Law for International Sales under the 1980 United Nations Convention’, 3rd edition, The Hague, Kluwer Law International, 1999, available online at <http://www.cisg.law.pace.edu/cisg/biblio/honnold.html>
[cited as: Honnold ‘Uniform Law for International Sales’]

Nives Povrzenic ‘Interpretation and gap-filling under the United Nations Convention on Contracts for the International Sale of Goods’, available online at <http://www.cisg.law.pace.edu/cisg/biblio/gap-fill.html>
[cited as: Povrzenic ‘Interpretation and gap-filling’]

Peter Schlechtriem ‘Interpretation, gap-filling and further development of the UN Sales Convention’, available online at <http://www.cisg-online.ch/cisg/Slechtriem-e.pdf>
[cited as: Schlechtriem ‘Interpretation, gap-filling’]

Evelien Visser ‘Gaps in the CISG: In General and with Specific Emphasis on the Interpretation of the Remedial Provisions of the Convention in the Light of the General Principles of the CISG’, available online at
<http://www.cisg.law.pace.edu/cisg/biblio/visser.html>
[cited as: Visser ‘Gaps in the CISG’]

Bruno Zeller ‘Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods’, available online at <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>
[cited as: Zeller ‘Four-Corners’]

4. Conventions and other documents

Convention relating to a Uniform Law on the International Sale of Goods (ULIS),
The Hague, 1 July 1964, available online at
<http://www.unidroit.org/english/conventions/c-ulis.htm>

Report of the Secretary-General, U.N. Doc. A/CN.9/54 (1971), reprinted in 2 Y.B. UNCITRAL 66, at 72, U.N. Doc. A/CN.9/SER/A/1971 [cited as: U.N. Doc. A/CN.9/54 (1971)]

United Nations Convention on Contracts for the International Sale of Goods
(CISG), Final Act of the United Nations Conference on Contracts for the
International Sale of Goods CISG, Apr. 11, 1980, U.N. Doc. A/CONF.97/18 (1980)
available online at <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf>